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Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World

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SECURED TRANSACTIONS HISTORY: THE FIRST CHATTEL MORTGAGE ACTS IN THE ANGLO-AMERICAN WORLD

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One of the most striking features of Anglo-American law is the requirement to file notice in public files of a nonpossessory secured

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transaction in order to enforce the transaction in the court against third parties.[1] The transaction of interest first developed during the early seventeenth century. English mortgage law developed for real estate. Originally, the parties structured mortgages with the secured-mortgagee in possession of the landed collateral, not the debtor-mortgagor.[2] But by the early seventeenth century, the English had developed the technique of leaving the debtor-mortgagor in possession of the land to work off the loan.[3] The English also had developed the use of personalty as collateral by the late sixteenth century.[4] Naturally, the technique of leaving the debtor in possession of the personalty would emerge early in the seventeenth century.[5]

Not all legal systems have the filing requirement. Roman law recognized the transaction, but did not require a filing.[6] The Napoleonic Code banned the transaction.[7] The modern explanation of these three different legal rules involves the secret

1. *See, e.g.*, U.C.C. § 9-317 (2002) (pertaining to an unfiled nonpossessory secured transaction being subordinate to a judgment lien); *id.* § 9-322 (stating that nonpossessory secured transactions rank by order of filing).

2. *See, e.g.*, Evans v. Thomas, 79 Eng. Rep. 150 (C.P. 1607) (finding that a mortgagor may reenter land after paying 100 pounds at end of thirteen years); Cordall v. Gibbons, 74 Eng. Rep. 17 (K.B. 1584) (involving possession by a mortgagor's tenant and a transfer ceremony to mortgagee before tenant as a witness); Reniger v. Fogossa, 75 Eng. Rep. 1 (Ex. Ch. 1550) (involving a mortgagor not in possession and payment to the mortgagor to have benefit of his land again); *see also* R.W. TURNER, THE EQUITY OF REDEMPTION: ITS NATURE, HISTORY, AND CONNECTION WITH EQUITABLE ESTATES GENERALLY 88 (photo. reprint, William W. Gaunt & Sons, Inc. 1986) (1931).

3. *See, e.g.*, Powsely v. Blackman, 79 Eng. Rep. 569 (K.B. 1623); *see also* Wyard v. Worse, 21 Eng. Rep. 528 (Ch. 1640); Hales v. Hales, 21 Eng. Rep. 520 (Ch. 1637); Sibson v. Fletcher, 21 Eng. Rep. 507 (Ch. 1633); Lucas v. Pennington, 21 Eng. Rep. 776 (Ch. 1630); Crips v. Grysil, 79 Eng. Rep. 636 (K.B. 1626); TURNER, *supra* note 2, at 89.

4. *See, e.g.*, Sir Wollaston Dixies Case, 74 Eng. Rep. 89 (Ex. Ch. 1588) (involving criminal information on usurious contract by way of mortgage on cloth); *see also* Winter v. Loveday, 74 Eng. Rep. 487 (K.B. 1589) (concerning documents as collateral held by mortgagee).

5. *See, e.g.*, ALICE GRANBERY WALTER, LOWER NORFOLK COUNTY: VIRGINIA COURT RECORDS, BOOK "A" 1637-1646 & BOOK B 1646-1651/2 210 (Clearfield Co. 1994) (1978) (discussing a binding over of one cow and two yearlings as security for a tobacco debt in 1645).

6. *See Code of Justinian*, bk. VIII, tit. XVIII, § 11 *in* S.P. SCOTT, THE CIVIL LAW 267 (photo. reprint. AMS Press 1973) (1932) (setting priority by order of execution).

7. *See* CODE NAPOLEON tit. XVIII, ch. III, arts. 2118 (George Spence trans., Claitor's Book Store 1960) (1827) (stating that you can only mortgage immovables and usufruct); *id.* at 2119 (stating that you cannot mortgage movables).

lien.[8] When debtors retain possession of the personalty serving as collateral under the nonpossessory secured transaction, subsequent lenders and purchasers have no way of discovering the prior ownership interest of the earlier secured creditors unless the debtor's honesty forces disclosure. Without that disclosure, the debtor could borrow excessively offering the same collateral as security several times, possibly leaving some of the debtor's creditors without collateral sufficient to cover their loan upon the debtor's financial demise.[9] Roman law solved the problem by providing a fraud remedy against the debtor.[10] The Napoleonic Code solved the problem by banning the transactions. Anglo-American law solved the problem by requiring a filing. Potential subsequent lenders and purchasers could then become aware of the debtor's prior obligation by examining the public files and protect themselves by taking the action they deemed appropriate, either not lending or charging higher interest.

This difference in treatment of the nonpossessory secured transaction raises the question of when, where, and under what circumstances did Anglo-American law adopt its filing approach to handle the nonpossessory secured transaction. Conventional history claims that chattel mortgage acts first arose in the northeastern seaboard states of the United States beginning in the 1820s to authorize the nonpossessory secured transaction due to the Industrial Revolution.[11] A perusal of the American appellate opinions during the period immediately before the 1820s reveals that the non-industrial southern seaboard states already possessed chattel mortgage acts.[12] Obviously, some mechanism other than

8. *Cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Little, Brown & Co. 1923) (1881) (discussing how rules survive the problem they were intended to solve).

9. *See* Ryall v. Rolle, 26 Eng. Rep. 107, 110 (Ch. 1749), *sub nom.* Ryall v. Rowles, 27 Eng. Rep. 1074, 1074-78 (Ch. 1749) (involving a debtor who offered the same collateral seven times).

10. *Digest of Justinian*, bk. XIII, tit. 7, § 36(1) *in* SCOTT, *supra* note 6, at 198 (discussing the criminal action of *stellionatus*); *see* J.A.C THOMAS, THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION AND COMMENTARY 206 (1975) (discussing the requirement that a debtor inform successive chargees of those charges and their value prior to making the successive charge or the debtor faces civil and criminal liability for fraud); MAX RADIN, HANDBOOK OF ROMAN LAW 207 (1927).

11. *See, e.g.*, 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 24-25 (1965). England adopted its first chattel mortgage act in 1854. *See* 17 & 18 Vict., c. 36 (Eng.), *reprinted in* 46 GREAT BRITAIN, THE STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND (1854).

12. *See infra* notes 195-264 and accompanying text.

the Industrial Revolution gave rise to the Anglo-American world's first chattel mortgage acts.

This article aims to determine when, where, and under what circumstances the first chattel mortgage statutes arose. This article first examines the southern colonial statutes mentioned in those early American appellate opinions and traces them to their earliest version. The article then explores analogous Anglo-American recording statutes for personalty, some mentioned in the early American appellate opinions as potential sources of the southern colonial chattel mortgage acts. These two investigations establish that the first chattel mortgage acts arose in the Chesapeake colonies during the mid-seventeenth century, shortly after the development of the nonpossessory secured transaction. The article then analyzes the earliest reported southern American opinions, from the late eighteenth and early nineteenth centuries, for clues to the circumstances giving rise to the first chattel mortgage acts. Lastly, the article reviews the scanty legislative history concerning these first chattel mortgage acts. These latter two investigations suggest that southern colonial legislatures first passed these statutes to eliminate the secret lien problem for judgment creditors.

I. THE SOUTHERN CHATTEL MORTGAGE ACTS

The early American opinions revealed five chattel mortgage acts, adopted in 1755 for Georgia,[13] 1748 for Virginia,[14] 1729 for Maryland,[15] 1715 for North Carolina,[16] and 1698 for South Carolina.[17] These southern chattel mortgage acts differed from those passed later in the northeastern states. The first chattel mortgage act passed in New England during the 1830s covered only filing for chattel mortgages.[18] However, these earlier southern

13. *See, e.g.*, Neal v. Kerrs, 4 Ga. 161, 165 (1848) (involving the Colonial Act of 1755).

14. *See, e.g.*, Clayborn v. Hill, 1 Va. (1 Wash.) 177, 182 (1793) (concerning the Virginia Act of 1748).

15. *See, e.g.*, Hudson v. Warner, 2 H. & G. 415 (Md. 1828) (discussing the Maryland Act of 1729).

16. *See, e.g.*, Cowan v. Green, 9 N.C. (2 Hawks) 384, 385 (1823) (involving the North Carolina Act of 1715).

17. *See, e.g.*, Cape Fear Steamboat Co. v. Conner, 37 S.C.L. (3 Rich.) 335 (1832) (discussing the South Carolina Act of 1698).

18. *See* George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303, 327-32 (1999).

chattel mortgage acts appeared as part of a statute also requiring the filing of mortgages on real estate,[19] or as part of a statute also requiring the filing of sales and other transfers.[20] All the chattel mortgage acts of the southern English-American colonies covered both real estate and personalty, and both sales and mortgages, except that of Maryland, which did not cover real estate.[21] Therefore, statutes referred to as chattel mortgage acts in this article are actually much broader, encompassing real estate as well as personalty and covering sales as well as mortgages. This article focuses on the nonpossessory secured transaction's filing aspect.

Chattel mortgage acts also came in three types. Some allowed permissive filing of the chattel mortgage, usually with a priority rule based on time of filing.[22] Others mandated a filing for validity of the chattel mortgage only against third parties.[23] Still others voided chattel mortgages entirely, even against the other party, if not filed.[24]

The mainland English-American colonies in the south adopted chattel mortgage acts during the seventeenth and eighteenth centuries. The type of chattel mortgage act adopted in these colonies divided the colonies into two groups. Those in Greater Virginia adopted mandatory chattel mortgage acts, requiring filing for validity against third parties. Those in Greater Carolina adopted permissive chattel mortgage acts, permitting filing, and providing priority based on the date of filing. These chattel mortgage acts, however, did not represent the sum total of the colonial efforts to deal with secret liens on personalty. Two colonial legislatures passed chattel mortgage acts that did not become effective, namely Maryland in 1642 and New York in 1774. In contrast, the Lower Counties on the Delaware of the Province of Pennsylvania banned the chattel mortgage in 1740.

A. Greater Virginia

Greater Virginia consisted of the Provinces of Virginia and Maryland.[25] The District of Columbia, formed from Maryland and

19. *See, e.g., infra* note 30 and accompanying text.
20. *See, e.g., infra* note 30 and accompanying text.
21. *See, e.g., infra* note 71 and accompanying text.
22. *See, e.g., infra* note 84 and accompanying text.
23. *See, e.g., infra* note 71 and accompanying text.
24. *See, e.g., infra* note 30 and accompanying text.
25. Most historians treat the social and economic histories of these colonies

Virginia in 1790,[26] and the State of Kentucky, formed in 1792 from territory ceded by Virginia in 1789,[27] were also part of Greater Virginia. Virginia adopted its first chattel mortgage act in 1643. A subsequent version of this act became the chattel mortgage act for those portions of Virginia that became the District of Columbia and Kentucky. Maryland adopted its first chattel mortgage act in 1729. This act also became the chattel mortgage act for that portion of Maryland that became the District of Columbia.

1. Virginia

Virginia, the first colony to provide for filing mortgages on chattels, adopted a chattel mortgage act on March 15, 1642/43:[28]

> Be it therefore enacted and confirmed, for redresse of the like inconveniencies hereafter that what person or persons soever either have since January 1639 [1640][29] or hereafter shall make or pass over any conveyance as aforesaid of any part or parcel of his estate in any other way or manner than what shall be done and acknowledged at a quarter court or monethly court and there registered such conveyance shall be adjudged fraudulent and to all intents and purposes void and of none effect.[30]

The statute had an exception for delivery to the secured party[31] and so only required filings for the nonpossessory secured transaction. This 1643 act did not specifically mention chattels, but only estates. The English colonists, however, envisioned that "any part of [an] estate" included personalty. The filings under this act revealed filings on only personalty by those persons that passed the

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together, despite their religious and political differences. *See* WARREN BILLINGS ET AL., COLONIAL VIRGINIA: A HISTORY 375 (1986).

26. Act of July 16, 1790, ch. 28, 1 Stat. 130.

27. Act of Feb. 4, 1791, ch. 4, 1 Stat. 189.

28. The burgesses actually passed this act in 1643. Until the adoption by England of the Gregorian Calendar in 1752, the year began on March 25 and ended on March 24. *See* 3 THE NEW ENCYCLOPEDIA BRITANNICA 603 (15th ed. 1978).

29. *See id.*

30. 1 WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 248-49 (1823).

31. 1 *id.* at 249 ("Provided that this act shall not extend to such persons who for satisfaction of just debts shall make a bill of sale of their estate or any part of them, and thereupon deliver the estate mentioned in a bill of sale into the possession of the creditor.").

act, namely councilors or their relatives.[32] Moreover, the subsequent 1656 act specifically referred to the 1643 act and explained it as including chattels, ending any such ambiguity about filing chattel mortgages:

> Whereas by the 15th act in March, 1642 [1643],[33] and also by the 15th of the 30th of Aprill, 1652, [34] it hath bin provided that no person or persons should passe over by conveyance or otherwise any part of his estate whereby his creditors not haveing knowledge thereof, might be defrauded of their just debts unless such conveyance were first acknowledged before the Governor and council or at the monthly courts and there registered in a booke for that purpose within six months after such alienation, this Assembly hereby confirmeth the aforesaid acts, and

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32. *See, e.g.*, 25 BEVERLEY FLEET, VIRGINIA COLONIAL ABSTRACTS 65 (1961) (discussing Thomas Wallis's mortgage of three servants—a Negro, an English boy, and an Indian woman—to George Ludlow in 1647); 26 *id.* at 32 (describing Thomas Privitt's binding John Madison to a steer and a heifer as security in 1648). George Ludlow, a merchant in York County, immigrated to Virginia before 1638, served as member of the Council beginning in 1642, and left extensive lands and a ship purchased from a London merchant on his death in 1656. *See* 2 PHILIP BRUCE, THE ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY (New York: MacMillan & Co., 1896) 317, 322, (York merchant) & 366 (in Virginia in 1638); Colonial Virginia Register, *at* http://www.ls.net/~newriver/va/varegl.htm (Councilor first in 1642), Possible Origin if Vincent Vass, Essex Co. Va. at http://genforum.genealogy.com/Vass/messages/411.html (left ship in will 1656). John Madison, a large landowner for transporting immigrants, was the son of Isaac Madison, a Councilor of Virginia in 1624. *See Genealogy of Kenneth Hinds, at* http://members.cts.com/crash/h/hindskw/KennethHinds/4317.html. Kenneth is an ancestor of President James Madison. *Id.* Between 1653 and 1666, he transported fifty-eight persons and died in 1683 with 1900 acres. *Id.*

33. *See supra* note 28.

34. The 1652 act was the Puritan Commonwealth's version of the 1640 act concerning filing of mortgages on land by allowing filing by an agent, requiring filing in the county where the land lay, and providing a six-month grace period for filing:

> That all Sales, Conveyances, and Mortgages of land on any termes whatsoever shall be acknowledged Either by the parties himselfe, or by Attorney in open Countye Court Respectively where the said lands lye, and are there to be Recorded in a perticular book for that purpose within six months after such Alienation.

Some Acts Not in Hening's Statutes: The Acts of Assembly, April 1652, November 1652, and July 1653, 83 VA. MAG. HIST. & BIOGRAPHY 22, 35 (William M. Billings ed., 1975).

The problem with the Puritan reenactment of mortgage filing in 1652 was that they also repealed all prior laws. *Id.* at 31. This left a period of no required chattel mortgage filings between 1652, and the correction of the oversight in 1656. Therefore, the 1656 chattel mortgage act reimposed chattel mortgage filing and extended these new innovative provisions to chattel mortgages.

> further explaineth them that no part of any estate whether in lands, goods, or chattells shall be made over otherwise than as aforesaid[35] is expressed.[36]

The Virginia legislature amended the chattel mortgage provisions many times during the colonial and early statehood eras. Besides the 1656 changes, in 1658 the burgesses appended a four-month period after filing in which any creditor could come and challenge the transaction as fraudulent.[37] In 1662, the burgesses provided that the statute did not apply if the item was delivered without the precondition of a debt.[38] This amendment removed recording for the basic sale. In 1705, the burgesses separated recordings for land and for personalty. The statute deeming slaves as realty, but exempting them from the new realty recording requirements, confirms this action. Parties were to transfer slaves as before.[39] That action meant recording only for the nonpossessory secured transaction on slaves. For real estate recordings, the burgesses required three witnesses and provided filing within eight months in the county where the land lay.[40] The 1705 statute also mentioned the six-month requirement of the 1662 Act and repealed all prior statutes only insofar as they related to matters of the statute, namely realty.[41] The Board of Trade rejected this statute.[42] In 1710, the burgesses reenacted the 1705 Act without the offending patent language that the Board of Trade had rejected.[43] In 1734, the burgesses reunited personalty and realty recording. The burgesses overruled the courts and made certain that unrecorded conveyances were valid between the parties, extended the developments of three witnesses and eight months to chattel mortgages, and permitted the filing of a chattel mortgage memorial rather than the entire document.[44] In October of 1748,

35. The preamble specified: "acknowledged before the Governour and Council or at the monthly courts and there registered in a booke for that purpose within six months after such alienation." 1 HENING, *supra* note 30, at 418.

36. 1 *id.* at 417-18.

37. *See* 1 *id.* at 472-73.

38. *See* 2 *id.* at 98-99.

39. *See* 3 *id.* at 233.

40. *See* 3 *id.* at 318; Roane v. Archer, 31 Va. (4 Leigh) 550, 556 (1833).

41. *See* 3 HENING, *supra* note 30, at 320, 328-29.

42. *See infra* note 133 (discussing the Board of Trade's authority).

43. *See* 3 HENING, *supra* note 30, at 517; 4 JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA xxxviii-xxxix (Henry Reed McIlwaine ed., 1912) (explaining Hening's error in believing the 1705 statute governed).

44. *See* 4 HENING, *supra* note 30, at 397, 399.

the burgesses allowed recording also in the General Court.[45] Only minor changes occurred thereafter. In 1785, the legislature provided for the transmittal of the memorial to the clerk of the General Court.[46] The 1748 version became the standard eighteenth century version.[47] The act of February 9, 1814 also provided for refiling upon moving to another county.[48]

The Virginia Chattel Mortgage Act treated the secret lien ambiguously. Originally, part of a broader act also requiring filing of real estate conveyances and mortgages,[49] as well as conveyances of chattels, the act voided all unrecorded transactions regardless of secrecy.[50] In the second year of the Restoration, in 1642, the burgesses limited the act with respect to chattels to the nonpossessory secured transaction.[51] This action meant that the Virginia Chattel Mortgage Act did not require recordings for sales with vendor possession, which also involves the secret lien. The Virginia Supreme Court of Appeals noted this limitation when it adopted the rebuttable rule for such sales when the vendor retained possession.[52] Prior to 1848, Virginia had used the absolute-conditional rule for sales with vendor possession.[53] After

45. *See* 5 *id.* 408, 411-12 (restating the 1734 act with the change).

46. 1785 Va. Acts ch. 62 (abolishing fee tails as well); *restated on December 13, 1792*, 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806 84 (photo. reprint, AMS Press, Inc., 1970) (1835); *restated in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 156 (1803), *restated in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 218 (2d ed. 1814); *restated in* THE REVISED CODE OF THE LAWS OF VIRGINIA 364 (B.W. Leigh ed., 1819).

47. *See* McGowen v. Hoy, 15 Ky. (5 Litt.) 239, 244-45 (1824) (stating that the 1748 Virginia statute applies to Kentucky in 1805).

48. 1814 Va. Acts ch. 10, § 8; *see, e.g.*, Heron v. Bank of the United States, 26 Va. (5 Rand.) 426, 428, 432 (1827) (involving clerk registration).

49. *See infra* note 186 (discussing Virginia real estate recording law).

50. Real estate filing statutes had earlier provided that unrecorded mortgages with debtor possession were fraud and void to all. 1 HENING, *supra* note 30, at 227 (stating that the sixteenth act of the 1639-40 laws provides mortgage without delivery is fraud unless recorded); 2 *id.* at 248-49 (stating that the twelfth act of March of 1642-43 laws provides mortgage to be registered or fraud to all and void).

51. *See supra* notes 28-36 and accompanying text.

52. *See* Davis v. Turner, 45 Va. (4 Gratt.) 422, 437 (1848).

53. *See, e.g.*, Hamilton v. Russel, 5 U.S. (1 Cranch.) 309 (1803); Thomas v. Soper, 19 Va. (5 Munf.) 28 (1816) (absolute sale recorded but possession with seller); Robertson v. Ewell, 17 Va. (3 Munf.) 1 (1811); Hardway v. Manson, 16 Va. (2 Munf.) 230 (1811). The absolute-conditional rule provides that if the transaction documents indicated an absolute sale, one without any conditions, but the parties permitted debtor retention of possession, the court found the

1734, the Virginia statute chattel mortgage act only voided those transactions with debtor possession for subsequent creditors and purchasers, the ones concerned about the secret lien.[54]

The Virginia Chattel Mortgage Act, unlike most other chattel mortgage acts, eventually required three witnesses,[55] permitted the filing of only a memorial,[56] and provided for a statewide filing.[57] Some perceived the filing location as a defect in the Virginia Chattel Mortgage Act. The legislature designed the statute for statewide filing with the secretary[58] in Williamsburg, and later Richmond.[59] The Virginia Chattel Mortgage Act accomplished this by requiring mortgagees to file locally in the counties within eight months of the execution of the chattel mortgage. Twice a year, the county would forward all filings to the secretary.[60] This meant that it did not matter in which county one filed.[61] It also meant that almost fourteen months could elapse before a prospective second mortgagee could readily locate the record. During this fourteen-month period, the secret lien problem existed for this mortgagee. Validity of the chattel mortgage dated from the date of signing, not

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transaction a fraudulent conveyance and would not enforce it against adversely affected third parties. But if the transaction documents indicated a conditional sale, one contingent upon some event such as a defeasance, and if the debtor's retention of possession was consistent with the conditions, then the court would enforce it against adversely affected third parties. *See* Stone v. Grubham, 80 Eng. Rep.1079, 1080 (K.B. 1615).

54. 3 HENING, *supra* note 30, at 517; 4 *id.* at 397.

55. *See* 3 *id.* at 305, 318; *see* Roanes v. Archer, 31 Va. (4 Leigh) 550, 551 (1833).

56. *See* 4 HENING, *supra* note 30, at 397, 399 (specifying the information); 5 *id.* at 408, 411.

57. *See* 4 *id.* at 397, 399 (requiring the filing with the secretary); 1785 Va. Acts ch. 62 (requiring the filing with the clerk of the General Court).

58. The Secretary of the Province, a Council member, kept the records of the province. WESLEY FRANK CRAVEN, THE SOUTHERN COLONIES IN THE SEVENTEENTH CENTURY, 1607-1689 278, 280 (1949).

59. Virginians made Williamsburg the capital in 1699 after Jamestown, the prior capital, burned. *See* 3 HENING, *supra* note 30, at 197 (discussing chapter 145 of the 1699 act); 3 *id.* at 419 (discussing chapter 43 of the 1705 act). Williamsburg remained the capital until centrally located Richmond became the capital in 1780. *See* 1779 Va. Acts ch. 21.

60. *See, e.g.,* 4 HENING, *supra* note 30, at 397, 399; *see also* Bond v. Ross, 3 F. Cas. 842 (E.D. Va. 1815) (No. 1623) (explaining the purpose of the 1748 act was to make General Court the place to find encumbrances). After 1792, the transmittal occurred once a year. *See* 1 HENING, *supra* note 30, at 84.

61. *See* Clayborn v. Hill, 1 Va. (1 Wash.) 177, 184-85 (1793) (holding that mortgages not voided for filing on slaves located in King William County, in New Kent County and in Sussex County).

the date of filing.[62] For this reason, John Marshall bemoaned this chattel mortgage act's filing defect first as a lawyer, and later as a justice.[63]

2. *Kentucky*

In forming the State of Kentucky from Virginia in 1792, the populace specified that the laws of Virginia would continue there.[64] This included the 1748 chattel mortgage statute of Virginia.[65] The Kentucky legislature eventually made changes. On December 11, 1820, the Kentucky legislature shortened the filing period to sixty days after execution, provided filing in the county where most of the property lay, and required only two witnesses.[66] Kentucky had earlier made changes for mortgages on real estate through an act of 1797 that allowed unrecorded mortgages validity against third parties with knowledge.[67]

Statewide filing was preserved automatically. The Virginia legislature had provided for statewide filing with the clerk of the General Court in 1785.[68] In 1787 the Virginia legislature provided that the Supreme Court of the District of Kentucky had the same powers and duties for the District as the General Court had in the remainder of the Commonwealth.[69] Therefore, Kentucky clerks transmitted recordings to the Supreme Court prior to statehood.[70]

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62. *See* Moore v. Auditor, 13 Va. (3 Hen. & M.) 232, 234 (1808) (holding that a deed of trust on Negroes, wagon, and cattle filed on day of execution after levy attempt, but within the eight month period, not invalid by virtue of late filing).

63. John Marshall's argument against the application of the Virginia Chattel Mortgage Act of 1748 to slave transactions was that the act provided for recording where the land lay. *See* Clayborn v. Hill, 1 Va. (1 Wash.) 177, 180 (1793). Marshall reintroduced this argument when he was Chief Justice of the U.S. Supreme Court. *See* Hodgson v. Butts, 7 U.S. (3 Cranch.) 140, 155-58 (1805) (declaring that this is Virginia law for a schooner).

64. KY. CONST. of 1792, art. VIII, § 6, *reprinted in* 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1272 (1909).

65. *See* McGowen v. Hoy, 15 Ky. (5 Litt.) 239, 244-45 (1824).

66. 1820 Ky. Acts 112; 1819 Ky. Acts 939.

67. *See* 1796 Ky. 72, 72; *McGowen*, 15 Ky. at 239; *see also* WILLIAM LITTLE & JACOB SWIGERT, A DIGEST OF THE STATUTE LAW OF KENTUCKY BEING A COLLECTION OF ALL THE ACTS OF THE GENERAL ASSEMBLY 304 (1822) (discussing the 1748 act); *id.* at 312 (discussing the 1797 act).

68. *See* 1785 Va. Acts ch. XLII.

69. *See* 1787 Va. Acts ch. XII.

70. Subsequent legislation confirmed this procedure. In 1798, the Kentucky legislature set court clerk fees to record deeds on slaves and personalty at 75 cents.

3. Maryland

In July of 1729, Maryland became the fourth colony to adopt a chattel mortgage statute:

> BE IT THEREFOR ENACTED, *by the Authority, Advice, and Consent aforesaid,* That from and after the End of this Session of Assembly, no Goods or Chattels, whereof the Vendor, Mortgagor, or Donor, shall remain in Possession, shall pass, alter, or change, or any Property thereof be transferred to any Purchaser, Mortgagee, or Donee, unless the same be by Writing, and acknowledged before One Provincial Justice, or One Justice of the County where such Seller, Mortgagor, or Donor, shall reside; and be within Twenty Days recorded in the Records of the same County.
>
> PROVIDED ALWAYS, That nothing in this Act shall extend, or be construed to extend, to make void any such Sale, Mortgage, or Gift, against such Seller, Mortgagor, or Donor, his Executors, Administrators, or Assigns only, or any claiming under him, her, or them.[71]

The Maryland legislature provided in 1785 that a chattel mortgage filed late would be good from the filing date and permitted the Chancellor to record such deeds by judicial decree, provided the rights of those creditors arising between execution and judicial recordation remained unchanged.[72] Unlike the Virginia Chattel Mortgage Act, Maryland's act did not cover real estate.[73] The Maryland act did cover both conveyances and mortgages of chattels.

The Maryland Chattel Mortgage Act differed from that of Virginia in several aspects. It provided for a recording, not just a memorial.[74] The mortgagee had to make the filing in the county court where the debtor resided, not in any county for a statewide

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See 1798 Ky. Acts 131, 140. In 1800, the legislature amended that act to insure that customers, not the state, bore the cost of transmittals of conveyances. 1800 Ky. Acts 114, 114 (chap. LXXI).

71. MARYLAND, LAWS OF MARYLAND, ENACTED AT A SESSION OF ASSEMBLY, BEGUN AND HELD AT THE CITY OF ANNAPOLIS, ON THURSDAY THE TENTH DAY OF JULY, IN THE FIFTEENTH YEAR OF THE DOMINION OF THE RIGHT HONOURABLE CHARLES, LORD BARON OF BALTIMORE, ABSOLUTE LORD AND PROPRIETARY OF THE PROVINCES OF MARYLAND AND AVALON, & C., ANNO; DOMINI 1729 7, 8-9 (1729).

72. 1785 Md. Laws ch. 72, § 11; *see* Pannell v. Farmers' Bank of Maryland, 7 H. & J. 202, 205 (Md. 1826).

73. *See infra* note 189 (discussing Maryland real estate recording law).

74. *See* Gill v. Griffith, 2 Gill 270, 284 (Md. 1848).

filing. The mortgagee also had to make the filing within twenty days of execution, not eight months, significantly reducing the secret lien problem.[75]

4. District of Columbia

In creating the District of Columbia from Virginia and Maryland in 1801, Congress specified that the laws of Virginia would continue south of the Potomac River and the laws of Maryland would continue north of the Potomac River.[76] For the north side of the river, this included the 1729 Chattel Mortgage Act of Maryland.[77] For the south side of the river, this included the 1748 version of the Chattel Mortgage Act of Virginia.[78]

B. Greater Carolina

Greater Carolina consisted of the Provinces South Carolina, North Carolina, and Georgia. The later Provinces of British West Florida and British East Florida, both ceded by Spain in 1763, as well as the later States of Tennessee, formed from a North Carolina cession of 1790, and Alabama and Mississippi, both formed from a Georgia cession of 1802, also were part of Greater Carolina. South Carolina adopted its first chattel mortgage act in 1698. North Carolina adopted its chattel mortgage act in 1715.[79] A subsequent version of the North Carolina Act became the chattel mortgage act of the State of Tennessee. Georgia adopted its first chattel

75. *See id.*

76. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103.

77. *See* Noyes v. Brent, 18 F. Cas. 468 (D.C. Cir. 1840) (No. 10,373); Bruce's v. Smith, 3 H. & J. 499 (Md. 1814) (involving a D.C. chattel mortgage).

78. *See* Moore v. Ringgold, 17 F. Cas. 698 (D.C. Cir. 1829) (No. 9773) (explaining the 1748 Virginia chattel mortgage act).

79. Carolina originally included both South and North Carolina. *See* HUGH TALMAGE LEFLER & ALBERT RAY NEWSOM, THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA 33-34 (1954) (stating that the government formed in 1664 to 1670 with Governors for each county, two in present North Carolina and one in present South Carolina). In November of 1691, Carolina was reshaped to include a Governor in Charlestown (South Carolina) with authority to appoint a deputy governor for the northern portion of the colony. *Id.* at 48. Since the northern residents found it impractical to send delegates to a legislature in Charlestown, they maintained their own legislature. *Id.* The Proprietors created an independent North Carolina in 1710 under its own Governor with its first legislature meeting in 1711. *Id.* at 55. When the Charlestown legislature passed its chattel mortgage act in 1698, its jurisdiction covered only the southern portion of Carolina. *Id.*

mortgage act in 1755. A subsequent version of this act became the chattel mortgage act for that portion of Georgia that became the Territory of Mississippi, and later the Territory of Alabama. British West Florida adopted its chattel mortgage act in 1770. Any influence that act might have had ended with the Spanish conquest of British West Florida in 1780. The Spanish, however, had their own chattel mortgage act.[80] British East Florida did not adopt a chattel mortgage act.[81]

Although Greater Carolina initially adopted permissive chattel mortgage acts during the seventeenth and eighteenth centuries, most of the states from this region adopted mandatory chattel mortgage acts during the nineteenth century.[82] Georgia did not.[83]

1. South Carolina

On October 8, 1698, South Carolina became the second colony to adopt a chattel mortgage act:

> *Be it enacted*. . .that the sale or mortgage of negroes, goods or chattels which shall be first recorded in the secretary's office in Charles-Town, shall be taken, deemed, adjudged, allowed of and held to be the first mortgage, and good, firm, substantial and lawful in all courts of judicature within South-Carolina, any former or other sale or mortgage for the same negroes, goods and chattels not recorded in the said office notwithstanding.[84]

The South Carolina act also covered both conveyances and mortgages of both real estate and chattels.[85] Similar to the Maryland act, but unlike the Virginia act, the South Carolina Chattel Mortgage Act provided for a recording, not just a memorial. Similar to the Virginia act, the South Carolina Chattel

80. *See* George Lee Flint, Jr. & Marie Juliet Alfaro, *Secured Transactions History: The Impact of English Smuggling on the Spanish Chattel Mortgage Acts in the Spanish Borderlands*, 37 VAL. U. L. REV. 703, 730-31 (2003).

81. *See id.* at 737-38.

82. 1828 Ala. Acts 40; 1828 Fla. Laws 156, 159; 1822 Miss. Laws 299; 1820 N.C. Sess. Laws 4; 1843 S.C. Acts 236; 1831 Tenn. Pub. Acts 108.

83. The permissive Georgia statute of 1827 was still in effect in 1894. *See* LEONARD A. JONES, A TREATISE OF THE LAW OF MORTGAGES OF PERSONAL PROPERTY 234 (4th ed. 1894).

84. JOHN FAUCHERAUD GRIMKE, THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA, FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790 3 (1790) (laying out act number 161, section 1). In 1843, the South Carolina legislature converted this statute to a mandatory one. 1843 S.C. Acts 236.

85. *See infra* note 187 (discussing South Carolina real estate recording law).

Mortgage Act provided for statewide filing. But since the South Carolina Chattel Mortgage Act was permissive, it lacked any requirement of filing by a certain period.

The South Carolina act contained other significant provisions. The act required parties to file real estate transactions in a different office, the register's office.[86] Any debtor who entered a second mortgage without discharging the first forfeited the right to redeem the collateral.[87] The act transferred the right to redeem to the holders of the unrecorded mortgages.[88]

2. North Carolina

At the third biennial legislative meeting from November 1715 to January 1716, North Carolina became the third colony to adopt a chattel mortgage act:

> *Be it further enacted* . . .That every Mortgage of Lands, Tenements, Goods, or Chattels, which shall be first registered in the Register's Office of the Precinct where the Land lieth, or of Goods and Chattels where the Mortgager liveth, shall be taken, deemed, judged, allowed of, and held to be the first Mortgage, and to be good, firm, substantial, and lawful, in all Courts of Justice within this Government; any former or other Mortgage of the same Lands, Goods, or Chattels, not before registered, notwithstanding; unless such prior Mortgage be registered within fifty Days after the Date.[89]

In 1820, the legislature made the statute mandatory and reduced the filing period to six months.[90] In 1829, the legislature made the filing good only from the date of filing.[91] The North Carolina act also covered both conveyances and mortgages of both

86. GRIMKE, *supra* note 84, at 3.
87. *Id.*
88. *Id.*
89. JAMES IREDELL, LAWS OF THE STATE OF NORTH CAROLINA 22, 25 (1791), *reprinted in* 1 THE FIRST LAWS OF THE STATE OF NORTH CAROLINA (John D. Cushing, comp., Michael Grazier, Inc., 1984). North Carolina laws passed before 1715 are very fragmentary. 23 THE COLONIAL RECORDS OF NORTH CAROLINA i (William L. Saunders ed., 1886) [hereinafter Saunders]. The 1715 legislature, however, confirmed in its first six acts those existing earlier acts. *Id.* at 161. Since the chattel mortgage act was the twenty-eighth act passed after those six, North Carolina did not previously have a chattel mortgage act. 25 *id.* at 160.
90. 1820 N.C. Sess. Laws 4.
91. 1829 N.C. Sess. Laws 4.

real estate and chattels.[92] The North Carolina Chattel Mortgage Act, however, combined various features that appeared in the other southern chattel mortgage acts. Similar to Maryland's later act, the North Carolina Chattel Mortgage Act provided for filing where the debtor lived. Similar to the Virginia act, the North Carolina Chattel Mortgage Act provided a grace period for filing. In addition, similar to the South Carolina act, the North Carolina Chattel Mortgage Act was permissive.

The North Carolina act contained other provisions similar to the South Carolina statute. Any debtor who entered a second mortgage without discharging the first forfeited the right to redeem the collateral.[93] The act transferred the right to redeem to the holders of the unrecorded mortgages.[94]

The defect of the North Carolina Chattel Mortgage Act was that it did not apply to bills of sales of personalty.[95] This feature meant that some North Carolinians secreted the mortgage by making it a two-document transaction: (1) an absolute bill of sale to which the 1715 act did not apply; and (2) another recognizing the true security intention to defeat subsequent creditors and purchasers for value.[96] After statehood, the North Carolina legislature ameliorated the oversight, passing two additional registry acts relating to bills of sale for slaves, one in 1784, the other in 1789.[97]

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92. For North Carolina real estate recording law, *see infra* note 188.

93. IREDELL, *supra* note 89, § 12, at 25.

94. *Id.*

95. *See* Davidson v. Beard, 9 N.C. (2 Hawks) 520, 522 (1823) (stating that because most sales also involve a change of possession and so did not need public recordation). Secured parties used conditional bills of sale as another method of engaging in the nonpossessory secured transaction. *See* George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363, 384-87 (1999) [hereinafter Flint, *Secured*] (discussing English law); George Lee Flint, Jr., *Secured Transactions History: the Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era.*, N. ILL. U.L. REV. 1, 34-46 (2000) [hereinafter Flint, *Northern*] (discussing American law).

96. *See* Gaither v. Mumford, 4 N.C. (Taylor) 600 (1817) (concerning a sealed security agreement in addition to absolute bill of sale); Ingles v. Donaldson, 3 N.C. (2 Hayw.) 57, 58 (1798) (discussing an oral security agreement before witness to absolute bill of sale).

97. An act of 1784 required registration of bills of sale for chattels within nine months or be void. 1784 N.C. Sess. Laws 378. An act of 1789 extended this filing period to twelve months. 1789 N.C. Sess. Laws 480; *see* Cowan v. Green, 9 N.C. (2 Hawks) 384, 385 (1823); Banks v. Thomas, 19 Tenn. (Meigs) 28 (1838).

3. Tennessee

Congress, in creating the Territory South of the Ohio from North Carolina in 1790, specified that the laws of North Carolina would continue there.[98] This included the 1715 chattel mortgage statute and the 1789 bill of sale statute of North Carolina.[99] The Tennessee legislature eventually made changes. On November 23, 1819, the Tennessee legislature extended the filing period to twelve months after execution.[100] On December 30, 1831, the legislature converted the chattel mortgage statute to a mandatory one.[101]

4. Georgia

On March 7, 1755, Georgia became the fifth colony to adopt a chattel mortgage act:

> *Be it enacted*, that all conveyances of lands, tenements, negroes, and other chattels, or hereditaments whatsoever, or mortgages of the same, that were made before the passing of this act shall be registered in the register of the records' office of this province, within three months after the publishing of this act, except such as have been or may be hereafter executed in Europe, which shall be registered as directed by this act, within a twelve month and a day; and except such as have been or may be hereafter executed in the West India islands, or on the American continent, north of South Carolina, which shall be registered by this act within six months; and such as may be hereafter made within this province be registered within the space of sixty days from the date of the several deeds, conveyances, or mortgages; in failure of which, all such as lawfully and regularly registered as aforesaid, shall be deemed taken, and construed to be prior, and shall take place and be recoverable in law before any and every deed, conveyance, or mortgage which has not been lawfully registered as above, any law, custom, or usage to the contrary notwithstanding.[102]

Subsequent acts only altered the filing period. On April 7,

98. Act of Apr. 2, 1790, ch. 6, 1 Stat. 106.

99. *See* Banks v. Thomas, 19 Tenn. (Meigs) 28 (1838) (concerning the 1789 act); Douglass v. Morford, 16 Tenn. (8 Yer.) 373 (1835) (involving the 1715 act).

100. 1819 Tenn. Pub. Acts 70.

101. 1831 Tenn. Pub. Acts 108.

102. OLIVER HILLHOUSE PRINCE, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 158 (1822); *see* Neal v. Kerrs & Hope, 4 Ga. 161, 165 (1848).

1763, the Georgia legislature eliminated the filing period for a period of two years.[103] On December 24, 1768, the legislature changed the filing period to ten days for a period of three years.[104] The 1768 act was continued for an additional year in 1773 and made permanent in 1784 (late due to the British occupation of Savannah from 1778 to 1783).[105] On December 26, 1827, the legislature changed the filing period to three months.[106]

The Georgia act also covered both conveyances and mortgages of both real estate and chattels.[107] Similar to Virginia's act, the Georgia Chattel Mortgage Act provided for statewide filing with the register of records office with a sixty-day grace period for filing. Similar to the South Carolina act, the Georgia Chattel Mortgage Act was permissive.

The Georgia act contained other significant provisions. Any debtor who entered a second mortgage without noticing the first mortgage in the second mortgage forfeited the right to redeem the collateral.[108] The act transferred the right to redeem to the holders of the unrecorded mortgages.[109]

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103. 1 THE FIRST LAWS OF THE STATE OF GEORGIA 162 (John D. Cushing, comp., Michael Glazier, Inc., 1981) [hereinafter Cushing].

104. *Id.* at 237; PRINCE, *supra* note 102, at 160; *see* Ryan v. Clanton, 34 S.C.L. (3 Strob.) 411, 416 (1849) (discussing Georgia property removed to South Carolina).

105. 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 96 (Allen D. Candler ed., 1906) [hereinafter Candler] (setting out the 1768 act); 18 *id.* at 437-38 (setting out the 1773 continuation); 19 *id.* at 290-91 (setting out the 1784 continuance).

106. 1827 Ga. Laws 111.

107. For Georgia real estate recording law, *see infra* note 190.

108. PRINCE, *supra* note 102, at 158 (stating that the penalty was to be the same as in England for mortgagors who execute second mortgages without noticing the first). The English statute was the "Act to Prevent Fraude by Clandestine Mortgages." *See* 4 W. & M., ch. 16 (Eng. 1692), *reprinted in* 7 GREAT BRITAIN, STATUTES OF THE REALM 404 (1800-28) [hereinafter STAT. OF REALM]; *see also* JOHN J. POWELL, TREATISE ON THE LAW OF MORTGAGES 1406-07 (1826). The statute applied only to land and the penalty was forfeiture of the equity of redemption. 7 STAT. OF REALM, *supra,* §1, at 404. The printed version of the South Carolina act has a reference to this statute in the margin. *See* GRIMKE, *supra* note 84, at 3. Therefore, double mortgages were a problem in the British world in the 1690s.

109. The Georgia act merely referenced the English statute. *See supra* note 108. The English statute made the defrauded mortgagee the absolute owner of the land, subject to the first mortgage, and transferred the equity of redemption to the defrauded mortgagee. 7 STAT. OF REALM, *supra* note 108, § 3, at 404. The English statute did not require recording. *See id.* However, the Georgia act did require recording. Therefore, the Georgia version of the English remedy would be to honor the recorded mortgage, the defrauded mortgagee, and transfer the equity of redemption to the unrecorded, the first, mortgagee. The 1768 version of the Georgia act made this clear. *See* PRINCE, *supra* note 102, at 111.

5. *Mississippi and Alabama*

Georgia extended its law to the Natchez Trace on February 17, 1783,[110] included a permissive chattel mortgage statute,[111] organized the area as the County of Bourbon on February 7, 1785,[112] and ceded it to the United States on April 24, 1802, retroactively to October 27, 1795.[113] The act of cession specified no law, except that the citizens were to have the same rights as those in the Northwest Territory.[114] On April 7, 1798, Congress created the Territory of Mississippi from this area specifying that the citizens had the same rights as those in the Northwest Territory.[115] Before the legislature met, the governor, Winthrop Sargent of Massachusetts, and his two judges, Daniel Tilton of New Hampshire and Peter Bryan Bruin of Mississippi, born in Ireland, guided solely by the codes of the Northwest Territory, where Sargent had served ten years as territorial secretary, passed a recording statute, mandatory for realty mortgages but permissive for chattel mortgages.[116]

The territorial legislature passed a statute requiring the recording of those chattel mortgages without adequate consideration in 1803.[117] On March 1, 1817, Congress divided the

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110. 1783 Ga. Laws 296, *reprinted in* Cushing, *supra* note 103, at 304.

111. *See supra* note 102 and accompanying text.

112. 1785 Ga. Laws, 273 *reprinted in* Cushing, *supra* note 103, at 258, 264.

113. 1802 Ga. Laws 3, 5.

114. 1802 Ga. Laws 6.

115. 1 Stat. 549-50 (1798). *See also* Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99 (1995).

116. 1799 Miss. Terr. Laws 64, 68 (requiring recorder to file mortgage of personal estate when presented), *id.* at 73 (requiring filing for land conveyances); *see Robert v. Haynes*, The Formation of the Territory, *in* 1 A HISTORY OF MISSISSIPPI 178, 181 (Richard Aubrey McLemore ed., 1973). The Mississippi Territory statute set up among others the office of recorder for which it quoted almost verbatim with very few changes all ten sections of the act of the Northwest Territory setting up the recorder's office. *Compare* 1795 N.W. Terr. Laws 102-06 (Maxwell's Code) *with* 1799 Miss. Terr. Laws 64, 73-77. This statute came directly from colonial Pennsylvania. *Compare* 1795 N.W. Terr. Laws 102-06, *with* 1715 Pa. Laws 51-57 *and* 1775 Pa. Laws 412-415 (note that § 1 is § 1 [1715]; § 2 is § V [1715]; § 3 is § VI [1715]; §§ 4 & 5 are § VIII [1715]; §§ 6 & 7 are § IX [1715]; § 8 is § 1 [1775]; § 9 is § IV [1775]; § 10 is § VI [1775]). The term "personal estate" in the Pennsylvania statute of 1715 meant only realty leaseholds since the earlier sections named only "lands, tenements, hereditaments" and "estate for life or years." *See* Bismark Bldg. & Loan Assoc. v. Bolster, 92 Pa. 123 (1879). It is doubtful that the Northwest Territorial and Mississippi Territorial acts were similarly limited. They deleted each of the offending sections.

117. 1803 Miss. Terr. Laws 9 (examining the fraudulent conveyance statute).

Territory of Mississippi, the western part becoming the State of Mississippi,[118] and the eastern part becoming the Territory of Alabama, on March 3, 1817, with the laws of the Territory of Mississippi continuing.[119] On March 2, 1819, Alabama became a state.[120] In 1822, Alabama passed a statute requiring refiling of chattel mortgages when moving from county to county.[121]

Both Mississippi and Alabama passed a mandatory chattel mortgage statute in the 1820s, voiding chattel mortgages with respect to third parties. Mississippi passed its own mandatory chattel mortgage act on June 13, 1822.[122] Alabama passed its act on January 11, 1828.[123]

6. British West Florida

On May 19, 1770, British West Florida became the sixth colony to adopt a chattel mortgage act:

> Be it enacted . . . all and every deed and deeds of sale, mortgage, or conveyance of any lands, Negroes, or other goods and chattels within this Province which shall be first registered and recorded in the Registrar's Office of this Province shall be deemed held and taken as the first deed or deeds of sale, mortgage, or conveyance, and as such shall be allowed, adjudged, and held valid in all courts of judicature within this Province, any former or other sale, mortgage, or conveyance being of the same lands, tenements, Negroes, or other goods and chattels and not recorded in the said office notwithstanding.[124]

The British West Florida act also covered conveyances and mortgages of both real estate and chattels. Similar to the South Carolina act, the British West Florida act provided for statewide

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See Baker v. Washington, 5 Stew. & P. 142 (Ala. 1833) (refusing to invalidate secured party's recorded 1826 deed of trust taken for valuable consideration on a Negro held by a third party because it lacked the official seal required for deeds of trust without valuable consideration under the 1803 fraudulent conveyance statute).

118. Act of March 1, 1817, ch. 23, 3 Stat. 348.

119. Act of March 3, 1817, ch. 59, § 2, 3 Stat. 371, 372.

120. Act of March 2, 1819, ch. 47, 3 Stat. 489.

121. 1823 Ala. Acts 21-22.

122. 1822 Miss. Laws 299, 300.

123. 1828 Ala. Acts 40-41 (attempting to more effectually prevent frauds and fraudulent conveyances and for other purposes).

124. ROBERT R. RHEA WITH MILO B. HOWARD, WEST FLORIDA, GENERAL ASSEMBLY, THE MINUTES, JOURNALS, AND ACTS OF THE GENERAL ASSEMBLY OF BRITISH WEST FLORIDA 377 (1979).

filing, was permissive, and had no grace period. Similar to the North Carolina act, the British West Florida act also provided for forfeiture of the right to redeem for entering a second mortgage without discharging the first, and transferring the right to redeem to the holders of unrecorded mortgages.[125]

C. Other Mainland English-American Colonies

The recording statutes of Greater Virginia and Greater Carolina were not the only filing statutes adopted by the mainland English-American colonies ostensibly dealing with the secret lien problem.

1. Maryland in 1642

Maryland became the first southern English-American colony to consider a chattel mortgage act, or at least one covering corn and tobacco. In the spring of 1642, the burgesses from Kent Island, formerly controlled by Virginia, called for a meeting of only the burgesses.[126] At that meeting, the Maryland burgesses passed an act on August 1, 1642, dealing with levies on corn and tobacco. That act provided that no mortgage or similar contract could prevent the levying of a judgment lien on corn or tobacco unless recorded in the Provincial Court prior to the granting of the levying judgment:

> An Act touching Executing upon Corne or Tobacco Enacted the 1st of August 1642 No attachmt Sequestrcon execution or other process may be layd upon Tobacco afore it can be struck in Cask nor upon any Corne afore it be in the house But after any jugmt entered against any party all the Corne & Tobacco of such parties shall stand and be obliged & bound to the use of that Judgmt so that it may not after that time be validly disposed of or applied to any other use until such Judgmt be released by the party or officer or by writt out of higher Court or be satisfied by paying the sume adjudged or tendring it (in such manner as the Law allowes in that behalf) or be balanced by Judgmt or like or greater value against the party upon pain of trespasse in all parties privy . . . . And if there be more Judgmts then one given upon any Corn or Tobacco such Corne or Tobacco (afore it be applied &

125. *Id.* at 377-78.

126. *See* AUBREY C. LAND, COLONIAL MARYLAND: A HISTORY 37 (1981).

> payed to the use of a former Judgmt) Shall stand bound in like manner as afore to the use of every Judgmt according to the order of the Judgmts . . . . And further provided that noe such judgmt as aforesaid be extended to the invalidating of any Recognizance Mortgage or like Contract (heretofore or before the publishing hereof in the County) made bona fide for Security and entered upon record afore the next Court day after the publishing hereof in the County (if the party interested in such mortgage be within the Province before the said Court day) or afore the next Court day after such party comeing into the Province or (if such party be not in these parts of America) afore the next Court day after Christmas come twelve month And that no such Recognizance Mortgage or Contracts for Security to be made after the publishing hereof in the County where they shall be made be valid to Stop or Suspend the use & effect of a Judgmt of aforesd unless such only as shall be extant upon Record at or afore the time of such Judgmt given Provided that no Judgmt upon a Recognizance or Confession of the defendant may be entred but in Court. This Act to endure till end of the next Assembly.[127]

The next assembly met the following month with all members in attendance, freemen as well as burgesses.[128] This assembly moved to repeal all of the laws passed by the burgesses alone and the governor was very receptive to the motion, especially regarding the statute for execution on tobacco.[129] The repeal carried.[130]

2. New York in 1774

In 1775, the colonial New York legislature passed a mandatory chattel mortgage act covering the nonpossessory secured transaction:

> if any Person . . . shall . . . give any Bill of Sale in Writing by way of Mortgage or Collateral Security for any Goods, Chattels or effect whatsoever, for any Consideration not exceeding the Sum of One Hundred Pounds within the

127. *See* 1 MARYLAND ARCHIVES 153-55 (1883-1925), *available at* http://www.mdarchives.state.md.us [hereinafter MARYLAND ARCHIVES].

128. *See* LAND, *supra* note 126, at 25 (stating that the assembly was composed of all freemen, not just the burgesses).

129. *See* 1 MARYLAND ARCHIVES, *supra* note 127, at 174.

130. *See* 1 *id.* at 176, 181-82 (repealing execution on tobacco); 1 *id.* at 195 (passing an act for tobacco execution that does not have the mortgage provision).

> said Counties [Queens, Orange, Dutchess, Albany, Richmond, and Kings], to two or more Persons, at different Times, and any doubt or dispute shall arise about the priority of such Bill of Sale, . . . the Bill of Sale first entered in the Register [of the Town] . . . shall be deemed and taken . . .to be the first and prior Bill of Sale . . . .[131]

The act provided priority for multiple mortgages.[132] However, the American Revolution intervened before it received the Crown's enacting approval.[133]

3. Delaware in 1740

The colonial Delaware legislature took a different stance, banning the nonpossessory secured transaction in 1740:

> Section 2. Be *it enacted by the honorable George Thomas, esq. By and with his Majesty's royal approbation, Lieutenant Governor and Commander in Chief of the counties of New-Castle, Kent, and Sussex, on Delaware, and province of Pennsylvania, by and with the advice and consent of the Representatives of the freemen of the said counties, in General Assembly met, and by the*

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131. 1775 N.Y. Laws 208, 209.

132. 1775 N.Y. Laws 208 (providing that this statute did not apply in Charlotte, Tryon, Suffolk, Ulster and Westchester counties, being the counties of the north, west, Long Island, and alternating strips on the Hudson River).

133. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 531 N.(A) (O.W. Holmes, Jr. ed., Little, Brown & Co., 12th ed. 1884) (1826). Parliament's authority did not extend to the non-English dominions held by the King of England, such as the Channel Islands, Wales, Scotland, etc. *See* ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836 1 (1983). Instead, the King in council legislated for the non-English dominions. *See id* at 2. Such legislation did not operate in a dominion unless expressly extended to the dominion. *See id.* at 3. Charters to the English-American colonies only authorized the colonists to pass laws not contrary to, and agreeable to, the laws and statutes of England. *See id.* at 4. In 1634, the Crown appointed a Council for Foreign Plantations, with authority to legislate for the colonies. *See* 11 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 70 (1938). After the English Revolution, the King shared sovereignty over the colonies with Parliament and the successor of the Council for Foreign Plantations became advisory until its subsumption into the Privy Council in 1688. *See id.* The Privy Council controlled relations between Great Britain and the colonies after the English Revolution. The Board of Trade and Plantations was created in 1695, at first treated as a committee of the Privy Council. *See id.* It had power to receive petitions and appeals from the colonies, confirm or disallow colonial laws, approved governors' instructions, approved colonial council appointments, received colonial boundary disputes, and resolved controversies between colonial governors and other appointees. *See id.* at 71.

> *authority of the same,* That no sale, or bill or bills of sale, which shall hereafter be made of any goods or chattels within any of the counties of this government, shall be good or available in law, or shall change or alter the property of such goods or chattels, unless a valuable consideration shall be paid, or really and bona fide secured to be paid for such sale or bill or bills of sale, and unless the goods and chattels sold or contained in such bill or bills of sale, shall be actually delivered into the possession of the vendee or vendees, as soon as conveniently may be, after the making of such sale or bill or bills of sale.
>
> Sect. 3. *And* if such goods and chattels sold, or contained, or mentioned in such bill or bills of sale, shall afterwards return or come into, and continue in the possession of such vendor or vendors, the same shall be chargeable and liable to the demands of all creditors of such vendor or vendors as aforesaid.
>
> Sect. 4. *Provided always, and be it further enacted by the authority aforesaid,* That all bills of sale made of goods or chattel within any of the counties of this government, by any person or persons within the same to any other person or persons, shall be good and effectual against the vendor or vendors of such goods and chattels, any thing herein contained to the contrary notwithstanding.[134]

Delaware courts held nonpossesssory security interests invalid against judgment liens under this statute.[135] Delaware's first chattel mortgage act did not come until 1877.[136]

II. ANALOGOUS RECORDING STATUTES

One theory of legal development holds that new legal rules come from adoption of rules from other, more developed legal systems.[137] For the southern chattel mortgage acts three

134. 1 DELAWARE, LAWS OF THE STATE OF DELAWARE FROM THE FOURTEENTH DAY OF OCTOBER ONE THOUSAND SEVEN HUNDRED 218-19 (1797) (preventing frauds by clandestine bills of sale). This act refers to the act declaring void all deeds and bills of sale given for lands of those who depart the colony without giving three-month notice. *Id.* at 188.

135. *See* Bowman v. Herring, 4 Del. (4 Harr.) 458 (1847) (involving a lender purchase money loan for mare).

136. *See* 1877 Del. Laws 616.

137. *See, e.g.,* ALAN WATSON, THE EVOLUTION OF LAW 116 (1985) (discussing rural southern towns adopting laws from the customs of Paris, Polish settlements

possibilities exist. The British Caribbean colonies required recording of interests in one class of personalty, namely slaves, during the eighteenth century. England had recording for interests in another class of personalty, namely ships engaged in the overseas American trade, in the seventeenth and eighteenth century. England had real estate recording by enrollment in the sixteenth century for bargains and sales of the freehold that did not apply to personalty. The American decisions mentioned two of them, the ship recording statutes and the statute of enrollments, as a possible source.

A. British Caribbean Personalty Recording Statutes

In their Caribbean colonies, the British also required that transferees of land record their interests. These statutes eventually included one type of personalty, namely slaves. These Caribbean chattel mortgage acts generally were mandatory, voided the transaction even between the parties, covered land and slaves, covered both sales and mortgages, and had various grace periods. The first of these chattel mortgage statutes appeared in St. Kitts in 1727:

> And for the preventing any frauds that may be committed by any double mortgage or sale of any lands, tenements, hereditaments, Negroes or other slaves, after any mortgage or sale made thereof, be it enacted, that every grant, bargain, sale or other conveyance hereafter to be made of any lands, tenements, hereditaments, Negroes or other slaves, for the securing the payment of any sum or sums of money, or quantity of sugar, or for the performance of any condition whatsoever, shall be void to all intents and purposes whatsoever, unless the same shall be entered and registered in the said office, if made and executed within this island, in one calendar month, and if beyond the seas, within one year after execution of such deed.[138]

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from Madgeburg, and German tribes from Rome).

138. *See* 1 JOHN HENRY HOWARD, THE LAWS OF THE BRITISH COLONIES IN THE WEST INDIES AND OTHER PARTS OF AMERICA CONCERNING REAL AND PERSONAL PROPERTY AND MANUMISSION OF SLAVES 474, 475 (photo. reprint, Negro Universities Press, 1970) (1827) (setting out 2 Geo. II, § 4 (1727) (Eng.): "An act against covinous and fraudulent conveyances, and for a public Registry in the Island of St. Christopher").

The other colonies followed with Jamaica before 1731,[139] Antigua in 1746,[140] Montserrat in 1754,[141] Nevis before 1762,[142] Bahamas in 1764,[143] Granada in 1767,[144] Tobago in 1768,[145] St. Vincent and Dominica in 1770,[146] the Virgin Islands in 1774,[147] Bermuda in 1786,[148] and Barbados in 1798.[149] This list essentially

139. 1 *id.* at 48, 49 (reprinting 4 Geo. II, c. 5, § 5 (1731) (Eng.): "An Act for the better preserving of the Records in the Several Public Offices of this Island, supplying and remedying Defects in several former Laws for preventing fraudulent Deeds and Conveyances, and recording old Wills in a prefixed Time," and providing in section 7a, ninety-day grace period). *See also infra* note 159 and accompanying text for possible earlier recording.

140. 1 HOWARD, *supra* note 138, at 415 (setting out 19 Geo. II, § 3 (1746 (Eng.): "An Act supplementary to an Act intituled, 'An Act for the better Regulation and Settlement of the Register's Office of the Island of Antigua, dated the 3d Day of November, 1698' and for altering and amending the said Act," granting a twenty-day grace period).

141. 1 *id.* at 455, 456 (reprinting 28 Geo. II (1754) (Eng.): "An act for the public registering of all Deeds, Conveyances and Wills that shall be made of, or that may affect any Lands, Tenements, Hereditaments or Slaves within the Island of Montserrat," covers recognizances also, valid between the parties).

142. 1 *id.* at 504 (setting out 2 Geo. III (1762) (Eng.): "An Act to amend and render more effectual an Act of this Island, intituled, 'An Act to settle and establish the Secretary's Fees of this Island, by making it necessary to record all Deeds, Conveyances, and Wills and Other Incumbrances, which shall be made of, or may effect, [*affect*] Lands, Tenements, Hereditaments or slaves in the Island of Nevis, and to prevent covenuus [*covinous*] and fraudulently [*fraudulent*] Dealings and Transactions therein' "). *See infra* note 159 and accompanying text for possible earlier recording.

143. 1 HOWARD, *supra* note 138, at 338 (reprinting 4 Geo. III, c.1 (1762) (Eng.): "An Act for the public registering and recording all Deeds and Conveyances that are or shall be made of any lands, Tenements or Hereditaments, Negroes, Vessels, Goods or Effects within the Bahama Islands").

144. 1 *id.* at 161, 162 (setting out 7 Geo. III, § 4 (1767) (Eng.): "An Act to make Slaves, Cattle, Horses, Mules, Asses, Coppers, Stills and Plantation Utensils real Estate of Inheritance, and declaring Widows dowable of them, as of Lands and Tenements").

145. 1 *id.* at 299, 300 (reprinting 8 Geo. III, § 3 (1768) (Eng.): "An Act declaring Slaves, Mules, Boiler, Stills and Still Heads, and other Plantation Utensils belonging to Mills, Bailing-houses and Still-houses, to be real Estate").

146. 1 *id.* at 222 (setting out 10 Geo. III, § 12 (1770) (Eng.): "An Act against covinous and fraudulent Conveyances, and for establishing a Public Registry in the Island of St. Vincent"); 1 *id.* at 250 (reprinting 10 Geo. III, §1 (1770) (Eng.): "An Act for regulating the Office and Conduct of the Register, and appointing his fees").

147. 1 *id.* at 12, 14 (setting out 14 Geo. III, c. 79, § 5 (1774) (Eng.), which stated that all mortgages of slaves and cattle executed in the colonies in the West Indies must be recorded if provided for by the laws of the colony); 1 *id.* at 388, 389 (reprinting 4 Ann., § 5 (1705) (Eng.) that enrolled deeds of lands and Negroes made in the Leeward Islands); 2 Howard, *supra,* note 138 at 322 (stating that for Virgin Islands, you must file in Tortolla).

148. In 1774, the British passed a statute that all mortgages of slaves and cattle

includes all of the British Caribbean colonies.[150] The preamble to the Dominican statute hints at the reason for the earlier statutes:

> Nothing will encourage the merchants of Great Britain to lend their money or advance the credit of the colony more than establishing a proper register's office.[151]

Many of these colonies had freehold slavery, where the slaves were deemed real estate. Barbados was the first in 1668,[152] followed by Nevis in 1681,[153] Jamaica and Antigua in 1684,[154] the Leeward

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made in the colonies in the West Indies must be registered if the colony had a registration act. 1 *id.* at 12, 14 (setting out 14 Geo. III, c. 79, § 5 (1774) (Eng.)). Bermuda passed such a registration act in 1786. 1 *id.* at 371 (reprinting 26 Geo. III (1786) (Eng.): "An Act to prevent Frauds and Abuses in Mortgages or other Conditional Conveyances of Property").

149. 1 *id.* at 139, 140 (setting out 39 Geo. III (1799) (Eng.): "An Act concerning Conveyances of Slaves"). This act repealed the provision against filing contained in the act declaring slaves to be real estate. *Id.* Barbados first required land recording in 1661. BARBADOS ACTS OF ASSEMBLY PASSED IN THE ISLAND OF BARBADOES, FROM 1658 TO 1718 29, 30 (1721) (setting out number 22, section 4) [hereinafter BARBADOS]. In 1668, Barbados declared slaves part of the real estate, but exempted interest in slaves from the earlier real estate recording requirement. *Id.* at 63-64.

150. The Turks and Caicos Islands, settled in 1678, were part of the Bahamas until 1848. *See* SANDRA W. MEDITZ & DENNIS M. HANRATTY, ISLANDS OF THE CARIBBEAN: A REGIONAL STUDY 566 (1989) (discussing the Turks and Caicos). The Cayman Islands, ceded by Spain in 1670 and formally annexed in 1863, and Belize, taken from the Spaniards in 1750, were part of Jamaica. *See id.* at 498, 576 (discussing Belize); *id.* at 565, 669 (discussing the Cayman Islands); CYRIL HAMSHERE, THE BRITISH IN THE CARIBBEAN 171 (1972) (discussing Belize). Anguila and Barbuda were part of Antigua. MEDITZ & HANRATTY, *supra*, at 646. The Grenadines, taken from France, were part of Grenada. *See* GERTRUDE CARMICHAEL, THE HISTORY OF THE WEST INDIAN ISLANDS OF TRINIDAD AND TOBAGO: 1498-1900 (1961) 306 (discussing Tobago). St. Lucia, Trinidad, and Guyana were acquired after 1795 as a result of the Napoleonic Wars. *See* MEDITZ & HANRATTY, *supra*, at 166 (referring to Trinidad in 1802); *id.* at 294 (discussing St. Lucia in 1814); *id.* at 429 (referring to Guyana in 1814). The Virgin Islands of Anegada, Tortolla, and Virgin Gorda were part of the Leeward Islands under the jurisdiction of Antigua until 1773. *See* ALAN BURNS, HISTORY OF THE BRITISH WEST INDIES 509 (1954) (stating that Tortolla had its own legislature in 1774); 1 HOWARD, *supra* note 138, at 520 (referring to the Virgin Islands Constitution of 1773).

151. 1 HOWARD, *supra* note 138, at 250.

152. *See* BARBADOS, *supra* note 149, at 64 (laying out Barbados Act No. 94 of 1668).

153. *See* 1 HOWARD, *supra* note 138, at 498 (setting out the Nevis Act of 32 Car. II: "An Act for ascertaining Lands, as also for affixing Slaves, Coppers, &c. to the Freehold, confirmed 8 Feb. 1681, § 2").

154. *See* CHARLES HARPER, LAWS OF JAMAICA PASSED BY THE ASSEMBLY AND CONFIRMED BY HIS MAJESTY IN COUNCIL APRIL 17, 1684 140-41 (1684) (passed on October 1, 1683); ANTHONY BROWN, THE LAWS OF THE ISLAND OF ANTIGUA: CONSISTING OF THE ACTS OF THE LEEWARD ISLAND, COMMENCING 8TH NOVEMBER 1690, ENDING 21ST APRIL 1798; AND THE ACTS OF ANTIGUA, COMMENCING 10TH APRIL

Islands in 1705,[155] St. Vincent and Grenada in 1767,[156] and Tobago in 1768.[157] Two of these colonies, Barbados and Antigua, already had land-recording statutes when they deemed slaves realty, so they exempted slave interests from the realty recording statute, at least until the passage of the slave recording statute.[158] In contrast, two of these colonies deemed slaves realty before they had a land recording statute, so when they passed realty recording statutes, slaves probably were included. Therefore, Jamaica may have had recording of interests in slaves as early as 1681 and Nevis as early as 1710.[159] Similarly, a few mainland English-American colonies also deemed slaves realty, but only long after passing their chattel mortgage statutes.[160]

1668, ENDING 7TH MAY 1804 86 (1805) (reprinting Antiguan Act No. 74, 1684: "An Act for the Annexing of Slaves to Freeholds in this Island").

155. *See* 1 HOWARD, *supra* note 138, at 386 (reprinting Leeward 4 Ann. (1705) (Eng.): "An Act for preventing tedious and Chargeable Law-suits, and for declaring Rights of particular Tenants").

156. *See* 1 *id.* at 161 (reprinting Grenada 7 Geo. III (1767) (Eng.): "An Act to make Slaves, Cattle, Horses, Mules, Asses, Coppers, Stills and Plantation Utensils real estate of Inheritance, and declaring Widows dowable of them, as of Lands and Tenements"); 1 *id.* at 220 (reprinting St. Vincent 7 Geo. III (1767) (Eng.): "An Act for making slaves real estate and the better government of Slaves and free Negroes").

157. *See* 1 *id.* at 299 (setting out 8 Geo. III (1768) (Eng.): "An act declaring Slaves, Mules, Boiler, Stills and Still Heads, and other Plantation Utensils belonging to Mills, Boiling-houses and Still-houses, to be real estate").

158. *See* BARBADOS, *supra* note 149, at 64 (creating an exemption from recording in 1668); BROWN, *supra* note 154, at 287 (bemoaning Antigua's preamble to 1746 slave-recording statute for a lack of recording for slaves).

159. *See* 1 HOWARD, *supra* note 138, at 49 (validating unrecorded deeds on slaves provided no second sale was already recorded in section 4 of Jamaica's 1731 statute); HARPER, *supra* note 153, at 140-48 (stating that the Jamaican 1681 deemer statute has no exception from realty recording statute passed the same year). *See* 1 HOWARD, *supra* note 138, at 504 (stating that the title of 1762 of the Nevis recording statute amends the earlier statute requiring recording of slaves); *id.* at 502 (discussing the earlier recording statute of 8 Ann. (1710) (Eng.)).

160. Virginia had such a statute from 1705 to 1792. *See* 3 HENING, *supra* note 30, at 333; 1 *id.* at 122, 128; *see also* 5 *id.* at 433 (trying to repeal the statute, but it was rejected by the king in 1751). The reason for deeming slaves realty was that Parliament of 1732 designed it to help English merchants recover debts in the colonies by directing them to be treated as real estate in the recovery of colonial debts. *See* 5 Geo. II, c. 7, (1732) (Eng.), *reprinted in* 16 DANBY PICKERING, THE STATUTES AT LARGE FROM THE SECOND TO THE NINTH YEAR OF KING GEORGE II 272 (1765) (creating easier recovery of debts in his Majesty's plantations and colonies in America). The Board of Trade's legal counsel, Matthew Lamb, took a hyper-technical position and interpreted inclusion of the word "Negroes" in a list of realty terms as authorizing freehold slavery but not chattel slavery. *See* M. Eugene Sirmans, *The Legal Status of the Slave in South Carolina, 1670-1740*, 28 J. SO. HIST. 462, 472 (1962); JAMES CURTIS BALLAGH, A HISTORY OF SLAVERY IN VIRGINIA 63-68

These Caribbean slave-recording statutes were significantly different from the chattel mortgage statutes of mainland English-America. They generally only covered slaves and a few sugar production utensils rather than all chattels and goods. Moreover, they came much too late to have influenced the Virginia chattel mortgage statutes of 1643 and 1656.

B. Ship Recording Statutes

One South Carolina court dealing with a ship noted that its state's chattel mortgage statute governed rather than the earlier navigation acts.[161] England began recording ship interests with the Navigation Act of 1660:

> And for prevention of all Frauds . . . Be it Enacted . . . That . . . noe Foraine built ship . . . shall be deemed or passe as a ship to England . . . until such time that he or they claiming the said Ship . . . shal make appeare to the chiefe Officer . . . of the Customes in the Port next to the place of his . . . aboade . . . and shall have taken an Oath . . . and that upon such Oath he . . . shall receive a Certificate . . . and said Officer . . . shall keepe a Register

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(1902); GERALD MONTGOMERY WEST, THE STATUS OF THE NEGRO IN VIRGINIA DURING THE COLONIAL PERIOD 11, 27-32 (1889). But the statute merely made the levy rules for both realty and personalty the same after 1732.

The Virginia statute also had a provision excepting recordation of sales of slaves, but not mortgages. *See* 3 HENING, *supra* note 30, at 334 (stating "no person . . . shall be obliged to cause such sale or alienation to be recorded, as is required by law to be done, upon the alienation of other real estate: But that the said sale or alienation may be made in the same manner as might have been done before the making of this act").

Kentucky followed suit in 1798, again long after the adoption of a chattel mortgage statute. 1798 Ky. Acts 105, 112. This statute became obsolete with the Thirteenth Amendment to the United States Constitution abolishing slavery. *See* 1865 Ky. Acts 156 (rejecting the Thirteenth Amendment); 1866 Ky. Acts 64 (providing compensation for those deprived of slave property by the Thirteenth Amendment).

In 1690, before it had a chattel mortgage statute, South Carolina had followed the 1668 Barbadian definition providing slaves "as to payment of debts, shall be deemed and taken as all other goods and chattels . . . and all Negroes shall be accounted as freehold in all other cases whatsoever, and descend accordingly." *See* Sirmans, *supra* note 160, at 464; 7 STATUTES AT LARGE OF SOUTH CAROLINA 343-47 (Thomas Cooper & David J. McCord, eds., 1970) (1836) [hereinafter STATUTES AT LARGE]. The proprietors did not accept this law. *See* Sirmans, *supra*, at 465. In 1740, South Carolina formally deemed slaves personalty. 7 STATUTES AT LARGE, *supra*, at 352-96.

161. *See* Cape Fear Steamboat Co. v. Conner, 37 S.C.L. 335 (1 Bail.) (1832) (referring to the 1660 and 1696 acts).

of all such Certificates . . . .[162]

The purpose of the various English navigation acts was to strengthen the navy by encouraging the merchant marine.[163] The acts accomplished this by requiring shippers to ship goods to England from abroad only on English ships.[164] The Navigation Act of 1660 provided that no goods could be imported to England from countries in Asia, Africa, or America except in English ships manned by an English master with three fourths of the crew being English, no alien could be a merchant in the Plantations, foreign goods had to come directly from the foreign country, no alien ships could engage in the coastal trade, and English ships were exempt from customs.[165] The navigation acts eventually resulted in the English reducing the threat of Dutch naval power and during the eighteenth century capturing their carrying trade.[166]

The recording requirement of the Navigation Act of 1660 only minimally aided the statute. The act allowed foreign-built ships to pass and English ships for trading with the colonies provided the owners made a certificate at the nearest port to their abode

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162. 5 STAT. OF REALM, *supra* note 108, at 248; *see* JAMES PERRONET ASPINALL ET AL., A TREATISE ON THE LAW RELATIVE TO MERCHANT SHIPS & SEAMEN (Shaw & Sons 14th ed. 1901), n.77 (stating that the first recording requirement appeared in the navigation act of 1660). The first navigation act, passed by Parliament in 1651, contained no registration requirement. It was named "An Act for Increase of Shipping, and Encouragement of the Navigation of this Nation." 2 ACTS AND ORDINANCES OF THE INTERREGNUM 559-62 (Charles Harding Firth & Robert Sangster Rait eds., 1911); *see* 6 HOLDSWORTH, *supra* note 133, at 316.
France later had a similar requirement. Louis IV of France by ordinance of October 24, 1681, required all shipowners to register for all ships, whether built in France or foreign countries, to ensure the owners were Frenchmen. *See* ASPINALL, *supra*, at n.77.

163. *See* 6 HOLDSWORTH, *supra* note 133, at 314, 316; ASPINALL, *supra* note 162, at 77.

164. *See* 6 HOLDSWORTH, *supra* note 133, at 316. Other nations adopted similar proposals. A Hanseatic ordinance of 1614 prohibited building of ships in Hanse towns except by citizens or those with the permission of the location's magistrate. *See* ASPINALL, *supra* note 162, at 77. Spain required all products destined for the Spanish Indies "to go on Spanish ships with Spanish crews, and to facilitate the collection of duties" and Spanish officials channeled cargoes through limited ports. MICHAEL C. MEYER & WILLIAM L. SHERMAN, THE COURSE OF MEXICAN HISTORY 180 (4th ed. 1991); *see also* JOHN GARRETSON CLARK, NEW ORLEANS, 1718-1812: AN ECONOMIC HISTORY 160 (1970) (describing eighteenth century reform proposals to eliminate the Spanish ship requirements).

165. *See* 5 STAT. OF REALM, *supra* note 108, at 246-47. England was defined to include Ireland, Wales, Berwick on Tweed, and the Plantations or territories belonging to his majesty. *Id.*

166. *See* 6 HOLDSWORTH, *supra* note 133, at 318-19.

testifying that they were not aliens and had bought the ship for valuable consideration.[167] The certificate was to be registered at the port with a duplicate sent to the Officers of the Customs in London.[168] The certificate had the names of all owners and the consideration paid. Parliament extended this recording to all ships built in England, Wales, Ireland, Berwick on Tweed, Guernsey, Jersey, and the Plantations of America and to prize ships engaged in the Plantation trade in 1696,[169] and in 1786 to all British colonies.[170]

The navigation acts, however, did not require registration of mortgages on ships. England did not require ship mortgage registration until 1894.[171] The English approach to the secret lien problem did not mandate recording, but voided the debtor's equity of redemption.[172] Moreover, the navigation acts' registration provisions significantly differ from the procedure of the chattel mortgage acts and came too late to have influenced the Virginia chattel mortgage statutes of 1643 and 1656.

C. *Statute of Enrollments*

Another court suggested the statute of enrollments as the origin for the realty recording statutes that led to the chattel mortgage statutes.[173] Henry VIII had the Statute of Enrollments passed in 1536 to aid in enforcing the Statute of Uses, the purpose of which was to raise the king's feudal revenue.[174] The Statute of

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167. 5 STAT. OF REALM, *supra* note 108, at 248.

168. *Id.*

169. *See* 7 *id.* at 106-07.

170. *See* DANBY PICKERING, THE STATUTES AT LARGE, FROM MAGNA CHARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN 646, 649 (1786).

171. *See* ASPINALL, *supra* note 162, at 42; 57 & 58 Vict., c. 60, § 31 (Eng.), *reprinted in* 31 GEORGE EDWARD EYRE & WILLIAM SPOTTISWOODE, THE LAW REPORTS, THE PUBLIC GENERAL STATUTES PASSED IN THE FIFTY-SEVENTH AND FIFTY-EIGHTH YEARS OF THE REIGN OF HER MAJESTY QUEEN VICTORIA 339, 349 (1894) (regarding mortgages filed).

172. *See supra* note 108.

173. *See* Roanes v. Archer, 31 Va. (4 Leigh) 550, 554-55 (1833) (referring to 27 Hen. 8, c. 16 (1536) (Eng.), which voided bargains and sales of land unless enrolled in one of the king's courts within six months, and the Virginia Acts of 1643, 1652, 1656, and 1705, and erroneously suggesting the 1661 act repealed the earlier ones).

174. *See* 4 HOLDSWORTH, *supra* note 133, at 450 (regarding revenue), 4 *id.* at 455 n.4 (pertaining to enrollments a proviso).
The Anglo-Normans designed the land system with title in the King and with money burdens provided to the title-holder when the land descended to heirs,

Enrollments required recording of realty bargains and sales:

> Be it enacted . . . that . . . no Manours Londes Tentes or other Hereditaments shall passe . . . whereby any estate of enheritaunce or freehold shalbe made . . . by reason oonly of any bargayne and sale thereof, excepte . . . by writing indented sealed and enrolled in oon of the Kinges Courtes of Recorde at Westmynster; or elles within the same Countie . . . where the same . . . [shall] be . . . before the Custos Rotulos and ij Justices of the peace and the Clerke of the Peace of the same Countie . . . within syx Monethes nexte after the date of the same writings indented. . . .[175]

The statute also required the clerk of the peace to enroll and engross the realty deeds on a parchment delivered to the Custos Rotulum, available for inspection by any party.[176] The function of the statute was to permit transfers of land by written deed, rather than the medieval livery of seisin, and preserve publicity of the conveyance.[177] A bargain and sale under the statute required pecuniary consideration,[178] but the amount could be nominal.[179] The date of the subsequently enrolled bargain and sale related back to the date of the sealing and delivery of the deed.[180]

In England, the Statute of Enrollments failed to result in recorded realty deeds. The large landowners below the rank of baron, not receiving concessions from the Statute of Uses, viewed themselves as deprived of the power of making secure family

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during periods of wardship, or during periods of ransomship of the lord. GEORGE F. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 7 (1963). Lords avoided these burdens, along with criminal forfeitures such as mandated by the various fraudulent conveyance statute, and religious corporations could control land they could not otherwise control by creating a passive trust, the use, under which the trustee had no active duties other than the above burdens, avoided by multiple trustees and their periodic replacement. *Id.* at 7-8. The Statute of Uses provided that if a use was created for a beneficiary, the law deemed the beneficiary as the legal owner. *See id.* at 10-12.

175. 3 STAT. OF REALM, *supra* note 108, at 549.

176. *See id.* The Custos Rotulorum originally was the justice of the peace selected to keep the records, was appointed by the Crown after 1545, and appointed the clerk of the peace, who after 1545 kept the records of the peace and the sessions. *See* 4 HOLDSWORTH, *supra* note 133, at 149-50.

177. *See* WILLIAM HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 159, 290 (photo. reprint Clarendon Press 1977) (1927).

178. *See* Mildmay's Case, 76 Eng. Rep. 379, 381-82 (K.B. 1584).

179. *See* The Case of Sutton's Hosp., 77 Eng. Rep. 960 (K.B. 1613).

180. *See* Dymmock's Case, 79 Eng. Rep. 349 (K.B. 1617); Bellingham v. Alsop, 79 Eng. Rep. 44 (K.B. 1605).

settlements and secret conveyances.[181] The common law lawyers saw themselves deprived of a profitable business.[182] So the lawyers developed for these landowners transfers for the good consideration of blood or marriage, not a bargain and sale requiring enrollment since the parties exchanged no money, in the sixteenth century, and the lease for a term followed by a release, again not a bargain and sale requiring enrollment, in the seventeenth century.[183] The frauds spawned by the secrecy of the lease and release lead to a movement to record land titles, but the effort failed except for deeds, conveyances, and wills in Yorkshire and Middlesex during the eighteenth century.[184] The enrollment statute may have provided the source for the colonial land recording statutes.[185] Virginia commenced recording land transfers in 1619;[186] both South Carolina[187] and North Carolina in 1665;[188]

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181. *See* 4 HOLDSWORTH, *supra* note 133, at 453.

182. *See* 4 *id.* at 453.

183. *See* Iseham v. Morrice, 79 Eng. Rep. 696 (K.B. 1629); Lutwich v. Mitton, 79 Eng. Rep. 516 (K.B. 1621) (both upholding the sale and release).

184. *See* 11 HOLDSWORTH, *supra* note 133, at 586-87; *see also* 8 STAT. OF REALM, *supra* note 108, at 253 (citing 2 & 3 Ann. c. 4, 1703 for West Riding, Yorkshire); *id.* at 797 (citing 6 Ann. c. 35, 1707 for East Riding, Yorkshire); *id.* at 89 (citing 7 Ann. c. 20, 1708 Middlesex); 16 DANBY PICKERING, THE STATUTES AT LARGE FROM THE SECOND TO THE 9TH YEAR OF KING GEORGE II 489 (1765) (citing 8 Geo. 2, c. 6 (1735) (Eng.) for North Riding). Once it became apparent that Parliament would not pass such a national statute, the various counties petitioned separately for the recordation. *See* 11 HOLDSWORTH, *supra* note 133, at 587; HOLDSWORTH, *supra* note 177, at 307-08 (reporting Real Property Commission in 1829). The reform effort finally succeeded in 1875. *See* 38 & 39 Vict., c. 87 (Eng.), *reprinted in* 10 GEORGE EDWARD EYRE & WILLIAM SPOTTISWOODE, THE LAW REPORTS, THE PUBLIC GENERAL STATUTES PASSED IN THE THIRTY-EIGHTH AND THIRTY-NINETH YEARS OF THE REIGN OF HER MAJESTY QUEEN VICTORIA 951 (1875); ALBERT KENNETH KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 527 (Sweet & Maxwell 4th ed., 1958) (1932).

185. *See, e.g.*, GEORGE OSBOURNE, HANDBOOK ON LAW OF MORTGAGES 338 (2d ed. 1970) (coping the Virginia recording statute from the Statute of Enrollment); RUFFORD G. PATTON, LAND TITLES § 8 (1938) (coping the Massachusetts recording statute from the Statute of Enrollment); *but see* George L. Haskins, *The Beginnings of the Recording System in Massachusetts* 21 BOSTON U.L. REV. 281, 303 (1941) (discussing the Dutch origin). One Maryland land recording statute is even entitled an enrollment statute. *See infra* note 189.

186. Virginia commenced land recording shortly after 1618, the year that the Virginia Company gave instruction to Governor Sir George Yeardley to assign land to the inhabitants pursuant to rules. *Recording of Deeds and Wills*, 3 TYLER'S QUARTERLY MAGAZINE 253 (1922). These rules included a land recording system since books recording land grants existed as early as 1623. *Id.* Since the early land books and council journals before 1623 are lost, the earliest surviving land recordings begin in 1623. *Id.* The Indian uprising of 1622 undoubtedly destroyed the recordings prior to 1623. *See, e.g.*, THOMAS J. WERTENBAKER, VIRGINIA UNDER

THE STUARTS 1607-1688 49 (1914) (discussing that Indian strategy during 1622 uprising was to set fires to tobacco houses, tell of it, and ambush the English as they attempted to put out the flames). During the 1622-24 Indian War, the Indians would raid, burn, pillage, and murder. *Id.* at 51. The earliest surviving Virginia recording statute is the one of October 13, 1626, requiring all sales of land to be recorded in the court in James City within one year and a day. *Recording of Deeds and Wills, supra*, at 254 ("It is ordered at this Court yt all sales of lands and deeds of gifts of lands made and agreed on between partyes w'thin this Colonye be brought late ye Court at James Citty & there recorded and enrolled within one year and a day next after ye date thereof."). In January 1640, the Virginians also required the filing of mortgages on real estate. *See* 1 HENING, *supra* note 30, at 227 ("A deed or mortgage made without delivery of possession to be adjudged fraudulent unless entered in some court."). One reason given for the statute is Indian fire attacks. *See* 2 PHILIP ALEXANDER BRUCE, INSTITUTIONAL HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY 625 (1910). The Virginia public filing office replaced English muniment chests stored on private property for the keeping of conveyance documents.

English real estate law required physical possession of the deed for subsequent transfers of realty, including mortgages. *See, e.g.*, Head v. Egerton, 24 Eng. Rep. 1065 (1734) (holding that mortgage of first mortgagee who did not endeavor to obtain title document from debtor is second to second mortgage since he was an accessory to inducing the second mortgagee to lend); Peter v. Russell, 23 Eng. Rep. 1076 (1716) (holding that mortgage of first mortgagee, induced to lend realty lease documentation to debtor, is subsequent to second mortgagee if first mortgagee knew of debtor's intent to obtain further lending). This rule did not apply in York and Middlesex Counties after 1704 and 1708, respectively. *See supra* note 184 and accompanying text.

187. South Carolina as part of Carolina had land recording from 1665. *See* 1 Saunders, *supra* note 89, at 75, 79 (noting that Item 3 of the Agreement between the Carolina Proprietors and the Adventurers from Barbados and all others that shall adventure, settle, and plant in the Province required recording of all conveyances of land and houses from man to man, acknowledged before the Governor and some chief judge of a court, validity going to the first such conveyance recorded). This statute encompassed the two counties then existing, Albemarle County and Clarendon County in later North Carolina, and the county to be formed south of Cape Romain (near the Santee River) in later South Carolina. *Id.* at 79; *see also* LEFLER & NEWSOME, *supra* note 79, at 33-34. The Fundamental Constitution of Carolina, drawn by John Locke for the Proprietors on March 1, 1669, required recording of mortgages also. 24 Saunders, *supra* note 89, at 123, 132 (§ 81 providing that all deeds, leases, judgment, mortgages, and other conveyances that may concern land be recorded in a registry in each precinct [county] else be of no force, even against parties to the contract). The Proprietors did not succeed in getting the colonial legislatures (Carolina later had two, one for the north and one for the south) to adopt the Fundamental Constitution and gave up by 1693 for North Carolina, *see* LEFLER & NEWSOME, *supra* note 79, at 36, and by 1697 for South Carolina. *See* M. EUGENE SIRMANS, COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY 1663-1763 73 (1966). The instruction to Nicholas Trott from the Proprietors was another effort to force the recording of mortgages on land. *See infra* note 272 and accompanying text.

188. North Carolina as part of Carolina was subject to the Agreement of 1665 requiring land recording in Albemarle County. *See supra* note 187 and accompanying text. Of the six confirmed acts, two entitled "An act concerning

Maryland in 1666;[189] and Georgia in 1755.[190] The Statute of Enrollments might also be the source of filing for mortgages on realty.[191] But the Statute of Enrollments, with a six-month recording grace period, was not aimed at the secret lien problem.[192] Nor did that statute require filing for transactions concerning personalty.[193] But the Statute of Enrollments may have had an

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transferring rights" and "An act for the speedy settlement of lands" might include such recording. *Compare* IREDELL, *supra* note 89, at 1 (listing the twenty-eight new acts and six confirmed acts) *with* 25 Saunders, *supra* note 89, at 161 (listing only the twenty-eight new acts). Therefore, the 1715 act also began the recording of mortgages on land. *See supra* note 89 and accompanying text.

189. For land recording, *see* 1 MARYLAND ARCHIVES, *supra* note 127, at 487-88 (noting the law enacted in 1663: An Act for the Quieting of Possession of Lands and Establishing the Manner of Conveyances of Land for the Future). For real estate mortgage recording, *see* 2 MARYLAND ARCHIVES, *supra* note 127, at 389 (noting the law enacted in 1674, chapter 2: An Act for the Enrollment of Conveyances and Securing the Estates of Purchasers).

The Maryland Assembly had tried much earlier to pass a land recording statute, but it did not pass. *See* 1 MARYLAND ARCHIVES, *supra* note 127, at 61 (reprinting 1639, chapter 17: An Act for Assuring of Titles to Land). *See also* 49 MARYLAND ARCHIVES, *supra* note 127, at 8-9. For three decades Marylanders transferred land with assignments on the back of land patents or alternatively by seisin. *See* 49 *id.* at 8. *See also* 49 *id.* at 496 (discussing the 1665 foreclosure of pre-1663 mortgage, proved delivery by seisin through witnesses seeing the delivery of a tin funnel). Although the 1639 act failed to pass, there are isolated recordings of real estate deeds in the Provincial Court and the county courts before 1663. *See* 49 *id.* at 9.

190. The Royal Province of Georgia was formed in 1754. *See* KENNETH COLEMAN, COLONIAL GEORGIA: A HISTORY 174-75 (1976) (disbanding the trustees in 1752, but they remained until replaced by royal appointees in 1754). Before then Georgia had no lawmaking authority other than the Proprietors. *Id.* at 102-04. The Proprietors passed only three laws in 1735, including one prohibiting slavery, which was repealed in 1750. *Id.* Instead, the Proprietors relied on the charter and resolutions not communicated to Georgia as the laws. *Id.* at 103-04. The charter of 1732 decreed a land recording. *See* 2 THORPE, *supra* note 64, at 774-75 (discussing grants, lands, conveyances, and settlements of land be registered for purposes of determining quit rents). So the 1755 statute was the first Georgia statute relating to recording of mortgages on land. *See supra* note 102 and accompanying text.

191. English lawyers also drafted mortgages as bargains and sales, leases, and releases. *See* JOHN JOSEPH POWELL, A TREATISE ON THE LAW OF MORTGAGES 205 (Thomas Coventry ed., S. Brooke 5th ed. 1822) (1785). The cases indicate that if prepared in bargain and sale format, the parties enrolled mortgages. *See* Ruddall & Millers Case, 74 Eng. Rep. 271 (C.P. 1586) (enrolling bargain and sale upon a condition as in the case of mortgage); *see also* Hales v. Hales, 21 Eng. Rep. 520 (1637) (ordering the enrollment and mortgage be vacated); Emanuel College v. Evans, 21 Eng. Rep. 494 (1625) (involving a mortgage by lease of 500 years with clause of redemption, no mention of enrollment).

192. *See supra* notes 49-54 and accompanying text (discussing the Virginia acts).

193. The original proposed bill of the Statute of Enrollments did provide for

indirect impact, since many early recorded mortgages included both land and personalty.[194]

Although Anglo-American law developed several statutes requiring public filings for transactions involving personalty, none could serve as the source for the southern English-American colonial chattel mortgage acts. Two were passed after those chattel mortgage acts, one did not require filings for chattel mortgages, and one did not require filings for personalty. The British Caribbean legislatures, passing the most analogous statutes, passed their slavery chattel mortgage acts after most of the southern English-American colonial legislatures had passed their chattel mortgage acts. During the mid-seventeenth century, British Caribbean legislatures even exempted transactions in slaves as realty from the realty filing laws. Similarly, Parliament passed the British ship recording statutes after several southern English-American colonial legislatures passed their chattel mortgage acts, and the ship recording statutes did not require filings for ship mortgages. So the southern English-American colonial chattel mortgage acts were the earliest chattel mortgage acts in the Anglo-American world, arising in 1643 in the Chesapeake colonies.

III. THE AMERICAN DECISIONS

The reported American decisions provide clues to the

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permissive filings for transfers of chattels:

> (21) Provyded alweis that no person shalbe bownden to enrolle any suche oblygacyons, acquytaunces or other wrytinges concernyng personal thinges but at their owne free will and pleasures, and yff suche wrytinges be not knowledgyed and Inrollyd, yet neuerthelesse they shalbe of the same strenght as they shuld haue ben as yf thys acte had [never been] had nor made; And if suche thinges concernying personall thinges be knowledgyd and enrolled by auctoryte of this acte, that then euery of them, so being knowledgyd and enrollyd, shalbe of the same strenght and force and effecte as yf they had ben knowledgyd afore any Jugge of Record, and enrolled in any place amonges the kinges Recordes.

See 4 HOLDSWORTH, *supra* note 133, at 586. Colonial records do exhibit such voluntary filings. *See, e.g,* VA. COUNTY CT. (NORTHAMPTON COUNTY), COUNTY COURT RECORDS OF ACCOMACK-NORTHAMPTON, VIRGINIA 1632-1640 3 (Suzie M. Ames ed., 1954) (referring to a 1633 bill of sale for a cow); *id.* at 104 (referring to a 1635 release); *id.* at 131 (referring to a 1639 receipt); *id.* at 163 (referring to a 1640 promissory note); *id.* at 163 (referring to a 1640 power of attorney).

194. *See, e.g.*, VA. COUNTY CT., *supra* note 193, at 130 (referring to a 1638 mortgage of plantation, seven breeding sows, one boar, one rowboat, and thirty barrels of corn).

circumstances of the early chattel mortgage acts. These reported decisions are almost exclusively from the appellate level. The major drawback[195] to this body of evidence is that it provides a view more than a century after the passage of the southern chattel mortgage acts. These decisions, therefore, may not reveal the original business practices, much less the original problem addressed by statutes by then long obsolete or surpassed. The reason for the absence of earlier reported decisions is that lawyers generally did not report colonial decisions.[196] Historians cite as causes the availability of printed English opinions, which were regarded as the ultimate authority in the colonies, and the absence of a large American market to justify the printing cost.[197] By the turn of the nineteenth century American courts needed reports to avoid the confusion caused by forgetting, misunderstanding or erroneously remembering their prior decisions. Reported opinions in the southern states accordingly began over almost a seventy-year

195. Two other drawbacks exist. First, appellate courts typically hear cases with bizarre facts, which makes it difficult to infer the historical business practices from the opinions. Second, lawyers present only the facts favorable to their position, and judges report only the facts needed to justify their decision. Attenuated facts make it difficult to infer the business practices from the opinions. *See* Flint, *Northern*, *supra* note 95, at 6-7.

196. *See* CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 328 n.1 (Howard Fertig, Inc. 1966) (1911), (noting that reports of famous criminal or civil trials were occasionally published before the first official reporter). For later reported colonial opinions *see, e.g.*, Candler, *supra* note 105 (setting out various volumes for court proceedings); MARYLAND COURT OF APPEALS, PROCEEDINGS OF THE MARYLAND COURT OF APPEALS 1695-1729 (Carrol T. Bond ed., 1933); THOMAS HARRIS & JOHN MCHENRY, MARYLAND REPORTS, BEING A SERIES OF THE MOST IMPORTANT LAW CASES ARGUED AND DETERMINED IN THE PROVINCIAL COURT AND COURT OF APPEALS OF THE THEN PROVINCE OF MARYLAND FROM THE YEAR 1700 DOWN TO THE AMERICAN REVOLUTION 1 (1809); MARYLAND ARCHIVES, *supra* note 127 (setting out various volumes for proceedings in the Provincial Court from 1637 to 1683 and the Court of Chancery from 1669 to 1679); Saunders, *supra* note 89 (setting out various volumes for the minutes of the higher court and the executive council); RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA 1671-1779 (Anne King Gregorie ed., 1950); THOMAS JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730, TO 1740 AND FROM 1768, TO 1772 (William S. Hein & Co., Inc. 1981) (1829); BILLINGS ET AL., *supra* note 25, at 379 (stating that, other than reports of Edmund Randolph and Edward Barradell, records of the high court are lost). These reports of selected colonial cases include one opinion involving an improper chattel mortgage on a slave made after the 1643 chattel mortgage act. *See* Jones v. Langhorn, Jeff. 37 (Va. 1736) (raising the issue at to whether the holder of a life estate in a slave created before the 1705 statute deeming slaves realty could also mortgage the slave for ninety-nine years). The report made no mention of a filing since the dispute was between the parties.

197. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 39 (1990).

period ranging from 1778 for North Carolina to 1846 for Florida.[198] This practice began with private practitioners but was confirmed by statutes requiring appellate judges to write reasons for their opinions or authorizing the appointment of court reporters.[199] Due to this time gap in reporting after the passage of early chattel mortgage acts, the business practices reflected in the opinions of certain states are too far removed from the original transaction to provide much of an indication of the problem being addressed.

This article considers only the opinions of the states of Maryland, Virginia, North Carolina, South Carolina, and Georgia, each of which had a colonial chattel mortgage statute. The other southern states either derived their chattel mortgage statute from one of these five (Kentucky and Tennessee), had an extensive subjugation to the Spanish chattel mortgage act (Mississippi, Alabama, and Florida),[200] or had no early opinions (Delaware). This article further narrows the opinions selected for examination by limiting them to the pre-1830 opinions. The northern states began to adopt chattel mortgage acts in the 1830s[201] and their law

198. *See* WARREN, *supra* note 196, at 328-31 (stating that the dates for the first reports in Southern states are: 1778 for North Carolina (published 1797), 1780 for Maryland (published 1808), 1783 for South Carolina (published 1809), 1785 for Kentucky (published 1803), 1790 for Virginia (published 1798), 1791 for Tennessee (published 1813), 1818 for Mississippi (published 1834), 1820 for Alabama (published 1829), 1832 for Delaware (published 1837), 1845 for Georgia (published 1847), and 1846 for Florida (published 1847)).

199. For opinion statutes and constitutional provisions, *see* 1819 Ala. Acts 1; 1841 Ga. Laws 132; KY. CONST. of 1792, art. V, § 3, *reprinted in* 3 THORPE, *supra* note 64, at 1270; 1804 Ky. Acts 92; MD. CONST. of 1851, art. IV, § 2, *reprinted in* 3 THORPE, *supra* note 64, at 1727; S.C. CONST. of 1868, art. IV, § 32, *reprinted in* 4 THORPE, *supra* note 64, at 3295); 1829 Tenn. Pub. Acts 91. Maryland probably began reporting in 1809 by court rules since one of the reporters prior to 1851 was always a court clerk. Alexander MacGruder was appointed state reporter in 1851. *See, e.g.*, HARRIS & MCHENRY, *supra* note 196; *see also* A.C. MACGRUDER, REPORTS OF CASES ARGUED AND ADJUDGED IN THE COURT OF APPEALS OF MARYLAND (1896).
For reporter statutes, *see* 39 Del. Laws 50 (1830); 1845 Fla. Laws ch. 2; 1808 Ky. Acts 28; 1819 Miss. Laws 115; 1818 N.C. Sess. Laws 5; 1819 Va. Acts ch. 27. South Carolina had private reports until an official court reporter was provided in 1823, although the author found no statute authorizing the official reporter. *Cf.* EDWIN C. SURRENCY, *supra* note 197, at 42. *See* ROBIN MILLS & JON SCHULTZ, SOUTH CAROLINA LEGAL RESEARCH HANDBOOK 59 (1976); *compare* 3 D.J. MCCORD, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS OF SOUTH CAROLINA (1826) (official state reporter) *with* 2 D.J. MCCORD, REPORTS OF CASES DETERMINED IN THE CONSTITUTIONAL COURT OF SOUTH CAROLINA (1853) (written by a member of the Columbia bar for cases 1820 to 1822 cases).

200. *See* Flint & Alfaro, *supra* note 80, at 761.

201. *See* Flint, *supra* note 18, at 327-32. Connecticut post-chattel mortgage act opinions began in 1836. *See* Haskell v. Bissell, 11 Conn. 174 (1836), not

potentially could have influenced southern courts.[202]

The reports of these five southern states contained forty-five appellate opinions dealing with the nonpossessory secured transaction prior to 1830. Deciphering a clue as to the circumstances of the southern colonies' adoption of chattel mortgage acts during the seventeenth and eighteenth centuries requires the identification of the borrowers, those taking advantage of the priority rules for the nonpossessory secured transaction, and their courthouse opponent. Further clues come from business practices with the nonpossessory secured transaction, the timing of the nonpossessory secured transaction with respect to the loan, and the documentation of the transaction.

A. The Parties

The opinions infrequently identified the parties. Only seventeen of the forty-five opinions (38%) specified the debtor type. Nevertheless, the debtors in the early nineteenth century reflected in the opinions belonged primarily to that business spurring the economic growth of the south in that era and the colonial era: the commercial agriculturists. Planters dominated the southern economy during the colonial and post-colonial eras, first with Virginia tobacco and Carolina rice, and after 1793 with cotton from South Carolina, Georgia, and Mississippi.[203] Planters do not stimulate other industries since they tend to spend their money on imported luxury goods.[204] Therefore, merchants, predominantly those in Baltimore, made up the only other significant group.[205] The opinions reflected the planter dominance of the southern economy. Seven of the seventeen opinions (41%) specifying debtor type, the largest single grouping, dealt with loans to planters.[206] This group may actually have been larger,

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mentioned in Southern opinions. Rhode Island post-chattel mortgage act opinions do not begin until 1850. *See* Jenck v. Goffe, 1 R.I. 511 (1851).

202. Southern courts begin to cite the earliest post-chattel mortgage cases decided in Northern states in 1845. *See* Jones v. Webster, 48 Ala. 109, 111 (1872); Wanamaker v. Bowes, 36 Md. 42, 52 (1872) (citing Forbes v. Parker, 33 Mass. 462 (1834)); Hundley v. Buckner, 14 Miss. (6 S. & M.) 70, 70 (Miss. Ct. App. 1846).

203. DOUGLAS NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES 1790-1860, 42, 52 (1966).

204. *Id.* at 4.

205. *Id.* at 42.

206. *See, e.g.*, Gassaway v. Dorsey, 4 H. & McH. 405 (Md. 1799); Hattier v. Etinaud, 2 S.C. Eq. (2 Des.) 571 (Ct. App. 1808); Claytor v. Anthony, 27 Va. (6

encompassing also those unidentified debtors with several slaves.[207] Merchants were also well represented, appearing in six opinions (35%).[208] The southern economy included two other groups of comparable means: governmental officials and manufacturers. Three opinions (18%) concerned governmental figures and one (6%), a manufacturer.[209]

Examination of the collateral, described in forty-three opinions (96%), was much more indicative of the planter economy. Almost all the collateral consisted of slaves, appearing in thirty-eight opinions (84%).[210] The multiplicity of slaves, especially mixed

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Rand.) 285 (1828); Clayborn v. Hill, 1 Va. (1 Wash.) 177 (1793). *See* Hambleton's Ex'r v. Hayward, 4 H. & J. 443 (Md. 1819); Glasscok v. Batton, 27 Va. (6 Rand.) 78 (1828) (both including farmers as other debtors); *see also* Brogden v. Walker's Ex'r, 2 H. & J. 285 (Md. 1808) (discussing heirs).

207. *See infra* note 210.

208. *See* Hudson v. Warner, 2 H. & G. 415 (Md. 1828); Ambler v. Warwick, 28 Va. (1 Leigh) 195 (1829) (concerning merchant firms); *see* Lang v. Lee, 24 Va. (3 Rand.) 410 (1825); Williamson v. Farley, 21 Va. (Gilmer) 15 (1820) (concerning merchants); *see also* Hodgson v. Butts, 7 U.S. (3 Cranch.) 140 (1805) (applying Virginia law).

209. *See* Bond v. Ross, 3 F. Cas. 842 (E.D. Va. 1815) (No. 1623) (concerning a manufacturer); North v. Drayton, 5 S.C. Eq. (Harp. Eq.) 34 (1824) (concerning a relative to the governor); Jenning v. Attorney General, 14 Va. (4 Hen. & M.) 424 (1809) (concerning a sheriff); Moore's Ex'r v. Auditor, 13 Va. (3 Hen. & M.) 232 (1808) (concerning a sheriff).

210. For collateral of "Negroes," *see* Winn v. Ham, R.M. Charl. 70 (Ga. 1821); *Hambleton's*, 4 H. & J. 443; Bruce Adm'rs v. Smith, 3 H. & J. 499 (Md. 1814); *Gassaway*, 4 H. & McH. 405; Davidson v. Beard, 9 N.C. (2 Hawks.) 520 (1823); Anonymous, 3 N.C. (2 Hayw.) 26 (1797); Craik's Adm'rs v. Clark, 3 N.C. (2 Hayw.) 22 (1797); *North*, 5 S.C. Eq. 34; *Hattier*, 2 S.C. Eq. 571; Harrison v. Strother, 1 S.C.L. (1 Bay) 332 (1793); Alexander v. Deneale, 16 Va. (2 Munf.) 341 (1811); Dabney v. Green, 14 Va. (4 Hen. & M.) 101 (1809); Jennings v. Attorney General, 14 Va. (4 Hen. & M.) 424 (1809); *Moore's Ex'r*, 13 Va. (3 Hen. & M.) 232; Commonwealth v. Ragsdale, 12 Va. (2 Hen. & M.) 8 (1807); Ross v. Norvell, 1 Va. (1 Wash.) 14 (1791).

For collateral of "a Negro," *see* Cumming v. Early, R.M. Charl. 140 (Ga. 1822); Cowan v. Green, 9 N.C. (2 Hawks.) 384 (1823); Gaither v. Mumford, 4 N.C. (Taylor) 600 (1817); Ingles v. Donaldson, 3 N.C. (2 Hayw.) 57 (1798); Wolff v. O'Farrel, 5 S.C.L. (1 Tread.) (3 Brev.) 68 (1812); Glasscock v. Batton, 27 Va. (6 Rand.) 78 (1827).

For collateral of "slaves," *see Bond*, 3 F. Cas. 842; Watkins v. Stockett's, 6 H. & J. 435 (Md. 1825) (and land); *Brogden*, 2 H. & J. 285 (Md. 1808); Berry v. Glover, 5 S.C. Eq. (Harp. Eq.) 153 (1824); De Bardeleben v. Beekman, 1 S.C. Eq. (1 Des.) 346 (1793); *Ambler*, 28 Va. (1 Leigh) 195; Dust v. Conrod, 19 Va. (5 Munf.) 411 (1817); Harrison v. Harrison, 5 Va. (1 Call) 419 (1798); *Clayborn*, 1 Va. (1 Call) 419.

For collateral of "a slave," *see* Mulford v. ——, 3 N.C. (2 Hayw.) 244 (1803); Critcher v. Walker, 5 N.C. (1 Mur.) 488 (1810); *Berry*, 5 S.C. Eq. (Harp. Eq.) 153; Pledger v. Mandeville, 3 S.C.L. (1 Brev.) 286 (1803); *Claytor*, 27 Va. (6 Rand.) 285; Faulkner's Adm'x v. Brockenbrough, 25 Va. (4 Rand.) 245 (1826); Guerrant v.

with other items of commercial agriculture, such as land;[211] horses, cows, and sheep;[212] wagon and team and cattle;[213] corn, cattle, and tobacco;[214] furniture and horses;[215] and personal estate,[216] probably indicates a planter debtor. Also represented in four opinions (9%) was merchant collateral.[217] The remaining three opinions (7%) could be from any group.[218]

These debtors reflected the group in southern society needing to borrow money. This business, predominantly the commercial agriculturalists, would grant whatever rights reasonably needed to foster the borrowing including nonpossessory secured transactions.

Nineteen opinions identified parties demanding security (42%). Those groups allied with the planter dominated. In the early nineteenth century, American banks were composed of commercial merchants for the purpose of lending to other commercial merchants. The banks generally lent, not based on collateral, but based on guarantees, usually from commercial merchant members or their substantial friends.[219] Consequently, the majority of secured parties constituted relatives of the planter and note endorsers, as indicated in eleven opinions (58%).[220] The

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Anderson, 25 Va. (4 Rand.) 208 (1826).

211. *See Watkins*, 6 H. & J. 435; *Gassaway*, 4 H. & McH. 405; *Ambler*, 28 Va. (1 Leigh) 195.

212. *See Hambleton's*, 4 H. & J. 443.

213. *See Moore's Ex'r*, 13 Va. (3 Hen. & M.) 232.

214. *See Clayborn*, 1 Va. (1 Call) 419.

215. *See Harrison*, 5 Va. (1 Call) 419.

216. *See* Brogden v. Walker, 2 H. & J. 285 (Md. 1808) (and slaves).

217. *See* Hodgson v. Butts, 7 U.S. (3 Cranch.) 140 (1805) (applying Virginia law to schooners); Payne v. Kershaw, 16 S.C.L. (Harp.) 275 (1824); Lang v. Lee, 24 Va. (3 Rand.) 410 (1825) (discussing stock of goods).
See Hudson v. Warner, 2 H. & G. 415 (Md. 1828) (involving merchants and books, stationary, and wares).

218. *See* Guerard v. Polhill, R.M. Charl. 237 (Ga. 1822); Pannell v. Farmers' Bank of Maryland, 7 H. & J. 202 (Md. 1826) (involving personal estates). *See* Dupree v. Harrington, 16 S.C.L. (Harp.) 391 (1824) (involving a mare).

219. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 56 (1957) (discussing bank merchants of the first banks lending to themselves); *see also* Harold Livesay & Glenn Porter, *The Financial Role of Merchants in the Development of U.S. Manufacturing 1815-1860, in* 9 EXPLORATIONS IN ECONOMIC HISTORY 63, 65-67 (1971) (stating that banks lent only on strong collateral, usually government bonds or real estate mortgages, whereas banks would lend to wealthy merchants on their signatures).

220. For relatives, see *Brogden*, 2 H. & J. 285 (discussing an uncle); North v. Drayton, 5 S.C. Eq. (Harp. Eq.) 34 (1824) (involving a mother-in-law); De Bardeleben v. Beekman, 1 S.C. Eq. (1 Des.) 346 (1793) (concerning a nephew); Claytor v. Anthony, 27 Va. (6 Rand.) 285 (1828) (discussing an in-law); Dust v.

next largest group was merchants, with seven opinions (37%).[221] The remaining secured party was a British citizen for a 1763 transaction.[222]

These secured parties mirrored the groups in society with sufficient wealth to serve as guarantors, namely the planters, the merchants, and those selling on credit. They carefully sought some protection in extending credit. The appearance of relatives suggests that parties used the nonpossessory secured transaction to grant a preference.[223]

Not all opinions dealt with battles between the secured party and the third party. Of those opinions that did, none identifies the third party other than generically as judgment lien holder, purchaser, and executor. Hence, opinions dealing with an identifiable third party were much less numerous, amounting to ten opinions (22%). The merchants, namely mercantile firms, store owners, and ship masters, dominated with five opinions (50%).[224] The planters had three opinions (30%).[225] The state

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Conrod, 19 Va. (5 Munf.) 411 (1817) (involving a brother); *Harrison*, 5 Va. (1 Call) 419 (concerning a brother); Clayborn v. Hill, 1 Va. (1 Wash.) 177 (1793) (discussing a father).

For endorsers, see Hudson v. Warner, 2 H. & G. 415 (Md. 1828); *Pannell*, 7 H. & J. 202 (involving bank officers); Davidson v. Beard, 9 N.C. (2 Hawks) 520 (1823) (discussing surety for bank); Hattier v. Etinaud, 2 S.C. Eq. 571 (1808) (concerning a partner in Cuban plantation).

221. *See* Guerard v. Polhill, R.M. Charl. 237 (Ga. 1822); Ambler v. Warwick, 28 Va. (1 Leigh) 195 (1829) (discussing merchant firms); *Hodgson*, 7 U.S. (3 Cranch.) 140; *Lang*, 24 Va. (3 Rand.) 410 (discussing merchants); Cumming v. Early, R.M. Charl. 140 (Ga. 1822); Bruce Adm'rs v. Smith, 3 H. & J. 499 (Md. 1814); *Dupree*, 16 S.C.L. (Harp.) 391 (discussing sellers purchasing money).

222. *See* Gassaway v. Dorsey, 4 H. & McH. 405 (Md. 1799).

223. Courts honored preferences outside of bankruptcy, even if insolvent. *See, e.g.*, Cameron & Co. v. Scudder, 1 Ga. 204 (1846); Stover v. Herrington, 7 Ala. 142 (1844); Mitchell v. Beal, 16 Tenn. (8 Yer.) 134 (1835); M'Cullough v. Sommerville, 35 Va. (8 Leigh.) 415 (1836); *contra* Waters v. Comly, 3 Del. (3 Harr.) 117 (1840) (prohibiting an insolvent from preferring one creditor to another); Hickley v. President of Farmers & Merchs.' Bank of Baltimore, 5 G. & J. 377 (Md. 1833); Sellers v. Bryan, 17 N.C. (2 Dev. Eq.) 358 (1833); Merrick v. Henderson, 1 Miss. (1 Walker) 485 (1831); Ward v. Trotter, 19 Ky. (3 T.B. Mon.) 1 (1825); Wadsworth v. Griswold, 16 S.C.L. (Harp.) 17 (1823) (discussing assignment of promissory notes).

224. *See Hodgson*, 7 U.S. (3 Cranch) 140 (applying Virginia law to a schooner master); *Hudson*, 2 H. & G. 415 (involving a merchant firm); *Pannell*, 7 H. & J. 202 (Merchant firm); Gaither v. Mumford, 4 N.C. (Taylor) 600 (1817) (concerning a store owner); Williamson v. Farley, 21 Va. (Gilmer) 15 (1820) (hiring slaves to mercantile firm).

225. *See* Gassaway v. Dorsey, 4 H. & McH. 405 (Md. 1799) (planter); Claytor v. Anthony, 27 Va. (6 Rand.) 285 (1828) (involving the secured's brother and

appeared in two opinions (20%).[226]

So predominantly those closely allied with the planter debtor, the relatives and substantial planters and merchants, took security interests. They would become the proponents of the nonpossessory secured transaction. In contrast, other merchants and the government did not take security interests.

B. The Structure

Examination of the timing of taking the security interest, delineated in twenty-five opinions (56%), revealed the major use of the litigated nonpossessory secured transaction. Secured creditors desired a preference over other creditors when they felt insecure for some reason. Sixteen of the opinions (64%) involved prior lendings.[227] Only six opinions (24%) concerned current lendings, while three opinions (12%) dealt with purchase money loans.[228]

All forty-five opinions provided a description of the document creating the nonposessory secured transaction. The transaction of interest consists of using personalty as collateral and leaving its possession with the debtor. The parties generally labeled the transaction a pledge, a mortgage, deed of trust, or a conditional sale. For the English, a pledge required delivery of the collateral to the creditor and so would not fit the class of interest.[229] The distinction between a pledge and a mortgage, deed of trust, or conditional sale lay with who had ownership. The debtor retained ownership of the collateral under a pledge, and did not for a

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plantation leasee); Harrison v. Harrison, 5 Va. (1 Call) 419 (1798) (sons).

226. *See* Jennings v. Attorney General, 14 Va. (4 Hen. & M.) 424 (1809); Moore's Ex. v. Auditor, 13 Va. (3 Hen. & M.) 232 (1808) (discussing tax).

227. *See* Bond v. Ross, 3 F. Cas. 842 (E.D. Va. 1815) (No. 1623); Winn v. Ham, R.M. Charl. 70 (Ga. 1821); Brogden v. Walker's Ex'r, 2 H. & J. 285 (Md. 1808); *Gassaway*, 4 H. & McH. 405; North v. Drayton, 5 S.C. Eq. (Harp. Eg.) 34 (1824); Wolff v. O'Farrell, 5 S.C.L. (1 Tread.) (3 Brev.) 68 (1812); Hattier v. Etinaud, 2 S.C. Eq.(2 Des.) 571 (1808); Bordelon v. Beckman, 1 S.C.L. 345 (1793); Ambler v. Warwick, 28 Va. (1 Leigh) 195 (1829); *Claytor*, 27 Va. (6 Rand.) 285; Glasscock v. Batton, 27 Va. (6 Rand.) 78 (1827); Lang v. Lee, 24 Va. (3 Rand.) 410 (1825); Alexander v. Deneale, 16 Va. (2 Munf.) 341 (1811); *Jennings*, 14 Va. (4 Hen. & M.) 424; *Harrison*, 5 Va. (1 Call) 419; Ross v. Norvell, 1 Va. (1 Wash.) 14 (1791).

228. For current lendings, see *Hudson*, 2 H. & G. 415; *Pannell*, 7 H. & J. 202; Watkins v. Stockett's, 6 H. & J. 435 (Md. 1825); Hambleton's v. Hayward, 4 H. & J. 443 (Md. 1819); Ingles v. Donaldson, 3 N.C. (2 Hayw.) 57 (1798); Berry v. Glover, 5 S.C. Eq. (Harp. Eq.) 153 (1824). For purchase money lendings, see Cumming v. Early, R.M. Charl. 140 (Ga. 1822); Bruce v. Smith, 3 H. & J. 499 (Md. 1814); Dupree v. Harrington, 16 S.C.L. (Harp.) 391 (1824).

229. *See, e.g.*, Ross v. Norvell, 1 Va. (1 Wash.) 14, 19 (1791).

mortgage, deed of trust, or conditional sale.[230] The difference between a mortgage and a deed of trust and a conditional sale involved redemption of the collateral. For a mortgage or deed of trust, the debtor retained equitable title for purposes of reacquiring ownership of the collateral, a redemption in an equity court for a reasonable period after default. A conditional bill of sale eliminated this right of redemption. Instead, the debtor had a right to repurchase, provided the debtor satisfied the contractual payment conditions.[231] The difference between a mortgage and a deed of trust was that for a deed of trust a trustee owned the property on behalf of the secured party and usually under the direction of the secured party.[232]

Most documents either took the form of a chattel mortgage, sixteen opinions (36%);[233] a bill of sale, eleven opinions (24%);[234]

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230. *See, e.g., Ross,* 1 Va. at 19.

231. *See, e.g., Ambler,* 28 Va. (1 Leigh) at 209 (involving a deed of trust subject to redemption); Robertson v. Campbell, 6 Va. (2 Call) 421, 428 (1800) (pledging of slaves); Chapman v. Turner, 5 Va. (1 Call) 280, 287-88 (1798) (pledging of a slave); *see* JONES, *supra* note 83, at 96.

232. *See, e.g., Claytor,* 27 Va. (6 Rand.) at 286.

233. *See* Bond v. Ross, 3 F. Cas. 842 (E.D. Va. 1815) (No. 1623); Guerard v. Polhill, R.M. Charl. 237 (Ga. 1822) (filing unspecified between the parties); *Cumming,* R.M. Charl. 140; Winn v. Ham, R.M. Charl. (Ga. 1821) (filing unspecified between the parties); *Pannell,* 7 H. & J. 202 (not recording); Gassaway v. Dorsey, 4 H. & McH. 405 (Md. 1799); Davidson v. Beard, 9 N.C. (2 Hawks) 520 (1823); Cowan v. Green, 9 N.C. (2 Hawks) 384 (1823); Craik's Adm'rs v. Clark, 3 N.C. (2 Hayw.) 22 (1797) (filing unspecified); North v. Drayton, 5 S.C. Eq. (Harp. Eq.) 34 (1824); Payne v. Kershaw, 10 S.C.L. (Harp.) 275 (1824) (not filing); Harrison v. Strother, 1 S.C.L. (1 Bay) 332 (1793); Faulkner's v. Brockenbrough, 25 Va. (4 Rand.) 245 (1826) (filing unspecified); Dust v. Conrod, 19 Va. (5 Munf.) 411 (1817); Commonwealth v. Ragsdale, 12 Va. (2 Hen. & M.) 8 (1807); Harrison v. Harrison, 5 Va. (1 Call) 419 (1798).
In parenthesis are denoted those nonpossessory secured transactions that were not filed and those for which no mention of filing was made. Filing did not make any difference for disputes between the parties, which is also denoted. No designation indicates the transaction was filed.

234. For conditional bills of sale, *see* Hambleton's v. Hayward, 4 H. & J. 443 (Md. 1819); Bruce v. Smith, 3 H. & J. 499 (Md. 1814); Critcher v. Walker, 5 N.C. (1 Mur.) 488 (1810) (discussing an oral agreement between the parties with the filing unspecified); Bordelon v. Beckman, 1 S.C.L. 345 (1793).
For absolute bills of sale, requiring additional documentation to prove the intent for security, *see* Brogden v. Walker, 2 H. & J. 285 (Md. 1808) (filing unspecified between the parties); Gaither v. Mumford, 4 N.C. (Taylor) 600 (1817); Ingels v. Donalson, 3 N.C. 75 (1798); Anonymous, 3 N.C. (2 Hayw.) 26 (1797) (filing unspecified); Berry v. Glover, 5 S.C. Eq. (Harp. Eq.) 153 (1824) (filing unspecified between the parties); Hattier v. Etinaud, 2 S.C. Eq. (2 Des.) 571 (1808) (filing unspecified between the parties); *Ross,* 1 Va. (1 Wash.) 14 (not recorded between the parties).

or a deed of trust, eight opinions (18%).[235] Several opinions involved other forms, such as deeds, four opinions (9%),[236] contracts, four opinions (9%),[237] deed of defeasance, one opinion (2%),[238] and indenture, one opinion (2%).[239]

Most of these nonpossesory secured transactions were recorded in the appropriate filing office.[240] Twenty-five opinions (56%) dealt with filed nonpossessory secured transactions, four (9%) with the filing unspecified of which three dealt with disputes between the parties, and sixteen (35%) with no filing of which eight dealt with disputes between the parties.

C. Litigation

Even though the secured party in the South had the benefit of a filing statute, there still was litigation between the secured party and the debtor's judgment lien-holders, the debtor's purchasers, and the debtor's general creditors.

Most of the litigation involved the secured party battling third parties, appears in thirty opinions (67%).[241] The recording statute

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235. *See* Hudson v. Warner, 2 H. & G. 415 (Md. 1828); *Ambler*, 28 Va. (1 Leigh) 195; *Claytor*, 27 Va. (6 Rand.) 285; Glasscock v. Batton, 27 Va. (6 Rand.) 78 (1827); Guerrant v. Anderson, 25 Va. (4 Rand.) 208 (1826) (not recorded); Lang v. Lee, 24 Va. (3 Rand.) 410 (1825) (between the parties, filing unspecified); Williamson v. Farley, 21 Va. (Gilmer) 15 (1820) (filing unspecified); Moore's Ex. v. Auditor, 13 Va. (3 Hen. & M.) 232 (1808).

236. *See* Watkins v. Stockett's , 6 H. & J. 435 (1825); Alexander v. Deneale, 16 Va. (2 Munf.) 341 (1811); Jennings v. Attorney General, 14 Va. (4 Hen. & M.) 424 (1809); Dabney v. Green, 14 Va. (4 Hen. & M.) 101 (1809).

237. *See* Mulford v. ——, 3 N.C. (2 Hayw.) 244 (Super. L. & Eq.) (1803) (between the parties, filing unspecified); Dupree v. Harrington, 16 S.C.L. (Harp.) 391 (1824) (involving a conditional contract of sale filing unspecified); Wolff v. O'Farrell, 5 S.C.L. (1 Tread.) (3 Brev.) 68 (1812) (discussing a conditional contract of sale, filing unspecified); Pledger v. Mendeville, 3 S.C.L. (1 Brev.) 286 (1803) (concerning a verbal contract between the parties with the filing unspecified).

238. *See* Hodgson v. Butts, 7 U.S. (3 Cranch) 140 (1805).

239. *See* Clayborn v. Hill, 1 Va. (1 Wash.) 177 (1793).

240. *See supra* notes 28 to 105 for the statutes and the required filing office.

241. For the debtor's purchaser, fourteen opinions (31%), *see* Cumming v. Early, R.M. Chrl. 140 (Ga. 1822); Hudson v. Warner, 2 H. & G. 415 (Md. 1828); Gassaway v. Dorsey, 4 H. & McH. 405 (Md. 1799); Cowan v. Green, 9 N.C. (2 Hawks) 384 (1823); Ingles v. Donaldson, 3 N.C. (2 Hayw.) 75 (1798); *Dupre*, 16 S.C.L. (Harp.) 391; *Wolff*, 5 S.C.L. (1 Tread.) (3 Brev.) 68; Harrison v. Strother, 1 S.C.L. (1 Bay) 332 (1793); Ambler v. Warwick, 28 Va. (1 Leigh) 195 (1829); Glasscock v. Batton, 27 Va. (6 Rand.) 78 (1827); Guerrant v. Anderson, 25 Va. (4 Rand.) 208 (1826); Williamson v. Farley, 21 Va. (Gilmer) 15 (1820); Dust v. Conrod, 19 Va. (5 Munf.) 411 (1817); Harrison v. Harrison, 5 Va. (1 Call) 419

did not directly relate to the litigation between the secured party and the debtor, appearing in thirteen opinions (29%).[242] The remaining two opinions (4%) involved conflicts between the state and a purchaser[243] and the debtor and a judgment lien-holder.[244]

Of the litigation between the secured party and third parties, most involved efforts to recover the property or its value. The common law actions, fourteen opinions (31%), involved detinue, trespass, trover, replevin, and the writ of *scire facias*.[245] Similarly, the equity actions, found in eleven opinions (24%), involved bills to foreclose, to redeem on behalf of creditors or purchasers, to set

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(1798).

For the debtor's judgment lien-holder, ten opinions (22%), *see* Bond v. Ross, 3 F. Cas. 842 (E.D. Va. 1815) (No. 1623); Hambleton's v. Hayward, 4 H. & J. 443 (Md. 1819); Bruce v. Smith, 3 H. & J. 499 (Md. 1814); Davidson v. Beard, 9 N.C. (2 Hawks) 520 (1823); Gaither v. Mumford, 4 N.C. (Taylor) 600 (1817); De Bardeleben v. Beekman, 1 S.C. Eq. (1 Des.) 346 (1793); Claytor v. Anthony, 27 Va. (6 Rand.) 285 (1828); *Alexander*, 16 Va. (2 Munf.) 341; *Jennings*, 14 Va. (4 Hen. & M.) 424; *Clayborn*, 1 Va. (1 Wash.) 177 (1793).

For the debtor's general creditors, six opinions (13%), *see Hodgson*, 7 U.S. (3 Cranch) 140 (schooner master); *Anon.*, 3 N.C. 26 (1797) (executor); Craik's Adm'rs v. Clark, 3 N.C. (2 Hayw.) 22 (1797) (same); Berry v. Glover, 5 S.C. Eq. (Harp. Eq.) 153 (1824) (same); North v. Drayton, 5 S.C. Eq. (Harp. Eq.) 34 (1824) (same); Moore's Ex. v. Auditor, 13 Va. (3 Hen. & M.) 232 (Ch. 1808) (tax collector).

242. *See* Guerard v. Polhill, R.M. Charl. 237 (Ga. 1822); Winn v. Ham, R.M. Charl. 70 (Ga. 1821); Pannell v. Farmers' Bank of Maryland, 7 H. & J. 202 (Md. 1826); Watkins v. Stockett's, 6 H. & J. 435 (Md. 1825); Brogden v. Walker, 2 H. & J. 285 (Md. 1808); Critcher v. Walker, 5 N.C. (1 Mur.) 488 (1810); Mulford v. ——, 3 N.C. (2 Hayw.) 75 (1798); Hattier v. Etinaud, 2 S.C. Eq. (2 Des.) 571 (1808); *Pledger*, 3 S.C.L. 286 (1 Brev.); Faulkner's Administrator v. Brockenbrough, 25 Va. (4 Rand.) 245 (1826); Lang v. Lee, 24 Va. (3 Rand.) 410 (1825); Dabney v. Green, 14 Va. (4 Hen. & M.) 101 (1809); Ross v. Norvell, 1 Va. (1 Wash.) 14 (1791).

243. *See* Commonwealth v. Ragsdale, 12 Va. (2 Hen. & M.) 8 (1807).

244. *See* Payne v. Kershaw, 16 S.C.L. (Harp.) 275 (1824).

245. *See Cowan*, 9 N.C. (2 Hawks) 384; *Gaither*, 4 N.C. (Taylor) 488; *Dupre*, 16 S.C.L. (Harp.) 391; *Guerrant*, 25 Va. (4 Rand.) 208; *Williamson*, 21 Va. (Gilmer) 15 (five opinions (11%) involving detinue). *See Bruce*, 3 H. & J. 499; *Davidson*, 9 N.C. (2 Hawks) 520; *Claytor*, 27 Va. (6 Rand.) 285; *Alexander*, 16 Va. (2 Munf.) 341 (four opinions (9%) concerning trespass). *See Ingels*, 3 N.C. 75; *Wolff*, 5 S.C.L. (1 Tread.) (3 Brev.) 68; *Harrison*, 1 S.C.L. (1 Bay) 332 (three opinions (7%) discussing trover). *See Gassaway*, 4 H. & McH. 405 (one opinion (2%) involving replevin). *See Hambleton's*, 4 H. & J. 443 (one opinion (2%) concerning the writ of *scire facias*).

Parties used replevin and detinue to recover property wrongfully taken and wrongfully kept, respectively. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151. They used trover and tresspass to recover damages for the value of converting the property to one's use and for injury to the property, respectively. *Id* at 152-53. They used the writ of *scire facias* to execute a detinue judgment. *Id.* at 413.

aside as a fraudulent conveyance, to stay execution, and to cancel the nonpossessory secured transaction.[246] The other common law actions, two opinions (4%), involved damages for use by the third party and money had and received by the third party.[247] The other equity actions, three opinions (7%), involved bills for accounting and discovery.[248]

Most of the issues involved dealt with issues not answered by the statute, such as whether the nonpossessory secured transaction was a fraudulent conveyance in certain situations, eleven opinions (24%),[249] the effect of late filing, seven opinions (15%),[250] where to file in certain situations, three opinions (7%),[251] and the effect of fraud by successors, one opinion (2%).[252] The other issues did not involve the statute. Two opinions (4%) involved ownership for expenses and profits.[253] Two opinions (4%) involved procedural

246. *See Hudson*, 2 H. & G. 415; *Ambler*, 28 Va. (1 Leigh) 195; *Harrison*, 5 Va. (1 Call) 419 (three opinions (7%) discussing bills to foreclose). *See Anon.*, 3 N.C. 26; *Craik's Adm'rs*, 3 N.C. (2 Hayw.) 22; *Dust*, 19 Va. (5 Munf.) 411 (three opinions (7%) discussing bills to redeem). *See Bond*, 3 F. Cas. 842; *Moore's Ex.*, 13 Va. (3 Hen. & M.) 232; *Clayborn*, 1 Va. (1 Wash.) 177 (three opinions (7%) discussing bills to set aside as a fraudulent conveyance). *See Jennings*, 14 Va. (4 Hen. & M.) 424 (one opinion (2%) discussing bills to stay execution). *See Berry*, 5 S.C. Eq. (Harp. Eq.) 153 (one opinion (2%) discussing bills to cancel).

247. *See* Cumming v. Early, R.M. Charl. 140 (Ga. 1822) (one opinion (2%) involving damages). *See* Hodgson v. Butts, 7 U.S. (3 Cranch) 140 (1805) (one opinion (2%) concerning money had and received).

248. *See* North v. Drayton, 5 S.C. Eq. (Harp. Eq.) 34 (1824) (one opinion (2%) discussing bills of accounting). *See* De Bardeleben v. Beekman, 1 S.C. Eq. (1 Des.) 346 (1793) (one opinion (2%) involving bills of discovery). *See* Glasscock v. Batton, 27 Va. (6 Rand.) 78 (1827) (discussing the remaining unspecified bill).

249. *See Hudson*, 2 H. & G. 415 (discussing an unrecorded deed against one with notice); *Hambleton*, 4 H. & J. 443 (involving a mortgagor in possession); *Gaither*, 4 N.C. 600 (Taylor) (concerning a filed absolute deed); *Anon.*, 3 N.C. 26 (discussing oral redemption); *Dupre*, 16 S.C.L. (Harp) 391 (involving an unrecorded deed against one with notice); *Berry*, 5 S.C. Eq. (Harp. Eq.) 153 (concerning a confessed judgment for absolute deed); *De Bardeleben*, 1 S.C.L. 345 (involving an unrecorded deed); *Guerrant*, 25 Va. (4 Rand.) 208 (concerning an unrecorded against one with notice); *Williamson*, 21 Va. (Gilmer) 15 (discussing an absolute-conditional rule destroys prior purchase); *Alexander*, 16 Va. (2 Munf.) 341 (involving filed absolute deed); *Clayborn*, 1 Va. (1 Wash.) 177 (keeping possession after releasing absolute deed).

250. *See Cumming*, R.M. Charl. 140; *Gassaway*, 4 H. & McH. 405; *Davidson*, 9 N.C. (2 Hawks) 520; *Cowan*, 9 N.C. (2 Hawks) 384; *Ingels*, 3 N.C. 75; *Jennings*, 14 Va. (4 Hen. & M.) 424; *Moore's Ex.*, 13 Va. (3 Hen. & M.) 232.

251. *See* Bruce v. Smith, 3 H. & J. 499 (Md. 1814) (filing in D.C.); Harrison v. Strother, 1 S.C.L. (1 Bay) 332 (1793) (involving a county filing); *Bond*, 3 F. Cas. 842 (filing jointly with land).

252. *See* Claytor v. Anthony, 27 Va. (6 Rand.) 285 (1828).

253. *See* Hodgson v. Butts, 7 U.S. (3 Cranch) 140 (1805) (concerning freight

matters.[254] The remainder involved insufficient witnesses,[255] keeping the property after satisfaction,[256] title on non-payment,[257] and the validity of future advances.[258]

These decisions clearly indicate the planter as the debtor.[259] Since planters similarly dominated the economy in the seventeenth century, the debtors for the first chattel mortgage acts probably also consisted of planters. The decisions also indicate two groups of lenders. Neighbors with credit to lend and sufficiently allied to the planter-debtor to obtain a security interest from the debtor served as secured parties.[260] Mercantile firms served as the other lender, unsecured as this lender was not so friendly with the debtor.[261] These decisions also indicate that planters granted most of these security interests long after borrowing the money.[262] The preferred transaction was the granting of a preference. Litigation did not involve battles between secured parties, but between a secured party and an unsecured party.[263] Since this structure is significantly different from modern practice with institutional lenders taking security interests before making the loans, one might expect the late eighteenth century business practice, namely planter debtors borrowing from planter neighbors taking eventually secured preferences with secret liens to baffle the debtor's unsecured merchant lenders attempting to levy their judgment liens, to closely resemble the earlier period when legislatures adopted the southern English-American colonial chattel mortgage acts. The 1642 Maryland Chattel Mortgage Act made clear that the legislative concern dealt with the battle between the mortgagee and a judgment lien, not two mortgagees.[264]

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charges); *North*, 5 S.C. Eq. (Harp. Eq.) 34 (involving rentals from collateral).

254. *See* Ambler v. Warwick, 28 Va. (1 Leigh) 195 (1829) (dealing with simultaneous law and equity actions); Harrison v. Harrison, 5 Va. (1 Call) 419 (1798) (addressing joinder of parties).

255. *See* Dust v. Conrod, 19 Va. (5 Munf.) 411 (1817).

256. *See* Glasscock v. Batton, 27 Va. (6 Rand.) 78 (1827).

257. *See* Wolff v. Farrel, 6 S.C.L. (1 Tread.) (1 Brev.) 151 (1812).

258. *See* Craik's Adm'rs v. Clark, 3 N.C. (2 Hayw.) 22 (1797).

259. *See supra* note 206 and accompanying text.

260. *See supra* note 220 and accompanying text.

261. *See supra* note 221 and accompanying text.

262. *See supra* note 233 and accompanying text.

263. *See supra* note 241 and accompanying text.

264. *See supra* notes 126 and 127 and accompanying text.

IV. THE LEGISLATIVE HISTORY

The provisions of these statutes suggest also that perhaps the secret lien problem did concern the colonial legislatures. The permissive statutes punished the debtor who entered into secret liens with forfeiture of the debtor's right to redeem the collateral. They also punished the secret mortgagee by granting the secret mortgagee the equity of redemption, meaning that he could pay twice for the collateral in order to obtain the collateral, depending on the amount he loaned and the amount of the recorded mortgage. The mandatory statutes punished the secret lien by making it void.

But these statutes had some provisions hinting otherwise. The colonies with mandatory filing acts allowed grace periods. During that filing period, the nonpossessory secured transaction itself was a secret lien. Once filed, its effective date would relate back to its execution date. For Virginia this period was eight months; for Maryland, only twenty days. One colony with a permissive filing act also had a grace period, namely Georgia, of sixty days. Those colonies that had no grace periods, South Carolina and British West Florida, did not require filing. They merely permitted it and gave priority to the first one filed. Moreover, Virginia even voided the transaction between the parties. These parties were not impacted by any secret lien. The meager legislative history, however, trumpets the secret lien problem.

The legislative material relative to these statutes consists of statutory titles and preambles and legislative journals. For the southern colonies during the Colonial Era, this material suffers two drawbacks. First, legislatures frequently did not preserve records of many of these proceedings. Lawyers need only this material when interpreting ambiguous statutory language.[265] Colonial legislative journals do not mention bill wording, floor debates, proposed amendments, or committee proceedings. They merely provided perfunctory bill titles and conclusions that a member made an unspecified amendment or the committee reported, without providing any details. Second, when records do exist, they are difficult to access. Some legislatures during the Colonial Era did not print records and make them available to practicing lawyers.

Of the southern colonies, printed versions of the legislative

265. *See* 2A NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION 278 (4th ed. 1984).

journals covering the years of interest for Virginia, South Carolina, Maryland, Georgia, British West Florida, and Delaware exist. Microfilm copies of printed legislative journals exist for New York. Those for North Carolina do not exist.[266]

A. Virginia

The preamble to the Virginia Chattel Mortgage Act suggests that creditors desired to eliminate the secret lien problem: "Whereas divers persons as dayly experience informeth doe closely and privately convey over their estates by way of mortgage not delivering possession whereby the creditors are defrauded and defeated of their just debts not having knowledge of the same."[267]

The title and preamble to the 1656 act suggests the same. The 1656 Act was entitled "Against Fraudulent Deeds."[268] The preamble stated:

> Whereas by the 15th act in March, 1642, and also by the 15th of the 30th of April, 1652, it hath bin provided that no person or persons should pass over by conveyance or otherwise any part of his estate whereby his creditors not having knowledge thereof, might be defrauded of their just debts unless such conveyance were first acknowledged before the Governor and council or at the monthly courts and there registered in a booke for that purpose within six months after such alienation, . . .[269]

The legislative journals for the House of Burgesses exist. Unfortunately, for the early periods, they contain no information concerning the bills.[270]

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266. *See* Saunders, *supra* note 89 (having Council journals but no Assembly journals for the years 1713-1728). *See also* WILLIAM SUMNER JENKINS, A GUIDE TO THE MICROFILM COLLECTION OF THE EARLY STATE RECORDS 171 (1950) (publishing assembly journals beginning in 1743); IGOR I. KAVASS & BRUCE A. CHRISTENSEN, GUIDE TO NORTH CAROLINA LEGAL RESEARCH 33 (1973); GRACE E. MACDONALD, CHECK-LIST OF LEGISLATIVE JOURNALS OF THE STATES OF THE UNITED STATES OF AMERICA 175 (1938).

267. 1 HENING, *supra* note 30, at 248.

268. *Id.* at 417.

269. *Id.* at 417-18.

270. *See* BURGESSES *supra* note 43, at 70-71 (mentioning nothing for the 1642/43 session); *id.* at 99-105 (saying nothing for the 1656 session); *id.* at 106-13 (mentioning nothing for the 1657/58 session); 2 HENING, *supra* note 30, at 14-19 (saying nothing for the 1661/62 session). The journals first describe bills for the 1680 session. *See also* 2 *id.* at 120.

B. South Carolina

The title and preamble to the South Carolina Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien problem. The Act was entitled "An Act to prevent Deceits by double Mortgages and Conveyances of Lands, Negroes and Chattels."[271] The preamble stated:

> Whereas the want or neglect of registering and recording of sales, conveyances and mortgages of lands and other goods and chattels, hath encouraged and given opportunity to several knavish and necessitous persons to make two or more sales, conveyances and mortgages of the same plantation, Negroes and other goods and chattels, the first sale, conveyance and mortgage being in force and not discharged, to several persons for considerable sums of money more than the same is worth, whereby buyers of plantations, and lenders of money upon second or after-mortgages, do often loose their money, and are put to great charges in suits of law and otherwise;. . .[272]

The instructions given to Nicholas Trott, the new Attorney General for the Carolina Proprietary on March 8, 1698, provided that he was to propose to the Governor, Council, and Assembly an act to be passed to record all deeds, conveyances, and mortgages of land in the Secretary's Office of Carolina.[273] But before Trott's arrival, the Assembly passed their version of the recording act. South Carolina had a unicameral legislature.[274] On September 27,

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271. *See* GRIMKE, *supra* note 84, at 3.

272. *Id.* at 3.

273. *Records in the British Public Record Office Relating to S.C. 1698-1700* 11-12 (Alexander S. Salley ed., 1946). This act would also require that all such deeds, conveyances and mortgages pass before the Attorney General for determination of the absence of encumbrances, that quit rents be excepted, that the parties acknowledge the transaction before the Governor and judges of the Court of Common Pleas, and that unrecorded deeds be void. *Id.*
Nicholas Trott (1663-1740), a lawyer, served as attorney general of Bermuda in 1696 and 1697, arrived in Charlestown on May 3, 1699, served as a member and speaker of the Commons House of Assembly in 1700, as a leader of the ruling faction for twenty years, chief justice in 1703 and 1729, and the Council with the exclusive right to make his presence necessary for a quorum in 1714-15, and wrote several books, including one in 1736 on the statutes of South Carolina. *See* 12 J.T. WHITE & CO., THE NATIONAL CYLCOPEDIA OF AMERICAN BIOGRAPHY 240 (1898).

274. *See* LEFLER & NEWSOME, *supra* note 79, at 34, 37 (discussing the original Carolina from 1665 to 1691); JENKINS, *supra* note 266, at 232 (stating that the Upper House journals start in 1721); *id.* at 242-44 (discussing the House of

1698, a bill for registering Sales and Mortgages was committed to Robert Stevens of Craven County[275] for preparation and presentment.[276] The bill to prevent deceits by double mortgages of lands, goods, and chattels with amendments was read the first time on October 1, 1698.[277] On October 3, 1698, with the word Negroes replacing goods, the bill was read a second time and passed.[278] This change indicates that the goods of significance were slaves.[279] On October 4, 1698, the bill was engrossed.[280] On October 8, 1698, the bill was read a third time and passed into law.[281]

C. North Carolina

The title and preamble to the North Carolina Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien problem. The act was entitled "An Act to appoint Public Registers, and to direct the Method to be observed in conveying Lands, Goods, and Chattels; and for preventing fraudulent Deeds on Mortgages."[282] The preamble stated: "and for the Prevention of Frauds by double Mortgages and Conveyances of Lands, Negroes, Goods and Chattels."[283]

Commons journals for 1692-1721). Until 1721, there was only one house.

275. ALEXANDER S. SALLEY, JR., JOURNALS OF THE COMMONS HOUSE OF ASSEMBLY OF SOUTH CAROLINA FOR THE TWO SESSIONS OF 1698 6 (1914).
Robert Stevens (-1720), an Anglican planter from Goose Creek, led the Goose Creek faction in opposing the Proprietors in the Commons House of the Assembly and became a spokesman for the Anglicans who favored an establishment of the Church of England in South Carolina. SIRMANS, *supra* note 187, at 71, 79. Robert Stevens emigrated from County Berks, England, served in the Common House from 1696 to 1702 and 1707, and died in St. James Parish on Goose Creek. 2 WALTER B. EDGER & N. LOUISE BAILEY, BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVE 657 (1977).

276. SALLEY, *supra* note 275, at 11.

277. *Id.* at 20.

278. *Id.* at 21.

279. The Virginians also recognized that slaves represented a great part of the wealth of the people. *See* Chapman v. Turner, 5 Va. (1 Call) 280, 283 (1798) (discussing Washington's argument that they once were realty to make them more easy of redemption than personalty under Tucker v. Wilson, 1 P. Wms. 261, 24 Eng. Rep. 379 (1714)).

280. SALLEY, *supra* note 275, at 23.

281. *Id.* at 26.

282. IREDELL, *supra* note 89, at 22.

283. *Id.* at 25.

D. Maryland

The title and preamble to the Maryland Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien problem. The Act was entitled "An Act for the Relief of Creditors, and to prevent Frauds and Deceits occasioned by Secret Sales, Mortgages, and Gifts of Goods and Chattels."[284] The preamble stated:

> Whereas divers Persons, being indebted to several of the Inhabitants of this Province, and Others His Majesty's Subjects, have Run away without making any Satisfaction to their Creditors, and either carried their Substance with them, or lodged the same in the Hands of some Persons in Trust to their owne Use; or made secret and fraudulent Sales thereof, to the great Prejudice of Creditors, and the Discouragement of Trade: . . .
>
> And whereas, It has often happened that several Persons have heretofore secretly made over unto their Creditors, or pretended Creditors, or given their own Children, or Others, sundry Goods and Chattels, and yet kept the same in their own Possession, whereby they have been believ'd to be the Proprietors of such Goods and Chattels, and thereby procure to themselves Credit for considerable Sums of Money, and Quantities of Tobacco, to the great Prejudice of several Inhabitants of this Province and Others:[285]

On July 17, 1729, the Lower House ordered that a bill be brought to record bills of sale and mortgages of chattels.[286] On July 21, 1729, Daniel Dulaney, Esq., of Anne Arundel County, delivered the bill from the Committee of Laws.[287] The Lower House read it the first time and committed it for amendment.[288] On July 23, 1729, Daniel Dulaney redelivered the bill and the Lower House

284. 36 MARYLAND ARCHIVES, *supra* note 127, at 388, 460.

285. 36 *id.* at 460-61.

286. 36 *id.* at 401.

287. 36 *id.* at 407. Daniel Dulaney (1685-1753), a lawyer born in Queen's County, Ireland, came to America in 1703, obtained admission to the Charles County, Maryland, bar in 1709, speculated in land, and served as a member of the Assembly from Annapolis from 1722 to 1742, attorney general of Maryland, the proprietor's agent, receiver general, commissary general in 1733, admiralty judge in 1734, and a member of the Governor's Council of Maryland from 1742 to 1753. A.N. MARQUIS CO., WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607-1896 158 (1963).

288. 36 MARYLAND ARCHIVES, *supra* note 127, at 413.

read it the first time with amendments.[289] On July 26, 1729, the Lower House read the bill a second time, passed it, and sent it to the Upper House with George Dashiel of Somerset County and Augustine Thompson of Queen Anne County.[290] The Upper House read it the first time on July 26, 1729,[291] and the second time on July 28, 1729, ordering it endorsed and returned to the Lower House with Philip Lee.[292] The Lower House read the bill and passed it for engrossing.[293] On July 29, 1729, the Lower House read it again and sent it to the Upper House with Edmund Jennings of Annapolis and Major William Turbutt of Queen Anne County.[294] The Upper

289. 36 *id.* at 413.

290. 36 *id.* at 417. George Dashiel (1691-1748), born in Somerset County, was a lawyer and a planter with more than 2000 acres, was admitted to the Somerset County bar in 1713, and served in the Lower House from 1719 to 1737 and from 1746 to 1748 for Somerset County, Clerk of Indictments for Somerset County 1726, Justice for Somerset County from 1734 to 1748, Justice of the Court of Oyer and Terminer for Somerset County in 1736, and as a Colonel in the militia in 1736. *See* 1 EDWARD C. PAPENFUSE, A BIOGRAPHICAL DICTIONARY OF THE MARYLAND LEGISLATURE, 1635-1789 252 (1979).

Augustine Thompson (1691-1739), born in Cecil County, was a planter with more than 4274 acres, was denoted by the title of gentleman by 1733, and served in the Lower House from 1728 to 1731 for Queen Anne's County, Justice for Queen Anne County from 1719 to 1738, and as a Captain in the militia in 1732. *See* 2 PAPENFUSE, *supra*, at 815.

291. 36 MARYLAND ARCHIVES, *supra* note 127, at 336.

292. 36 *id.* at 340. Philip Lee (1681-1744), born in Virginia, grandson of Richard Lee (? -1664), Secretary of Virginia, was a merchant-planter with more than 2467 acres, immigrated to Maryland with the title of gentleman in 1707, served in the Lower House from 1708 to 1711 and 1719 to 1722, in the Upper House from 1725 to 1742 for Prince George's County, in the Council from 1726 to 1732, was Associate Commissary General in 1727, naval officer of North Potomac from 1727 to 1744, Justice for Prince George's County from 1710 to 1720, Sheriff for Prince George's County from 1722 to 1725, and Captain in the militia in 1708. *See* 2 PAPENFUSE, *supra* note 289, at 815.

293. 36 MARYLAND ARCHIVES, *supra* note 127, at 422.

294. *Id.* Edmund Jennings (? -1756), born in Virginia, son of Governor Edmund Jennings of Virginia, was the most eminent practicing Maryland lawyer, admitted to the English bar in 1721 and Anne Arundel County in 1723, had more than 723 acres in Anne Arundel County, served in the Lower House from 1728 to 1731, in the Upper House from 1732 to 1752, was Deputy Secretary from 1733 to 1753, Judge of the Land Office from 1733 to 1738, and Collector of Patuxent from 1744 to 1745, and removed to London. *See* 2 PAPENFUSE, *supra* note 290, at 487-88.
William Turbutt (1684-1739), born in Kent County, was a planter-merchant with 923 acres in Queen Anne's County and Kent County, and served in the Lower House from 1716 to 1722 and from 1728 to 1731 for Queen Anne's County, was Justice of the Provincial Court in 1732, Judge of the Assize Court, Eastern Shore in 1734, Deputy Surveyor, Talbot County from 1711 to 1714, Justice of Queen Anne's County from 1718 to 1732, and Major in the militia in 1728. *See* 2 *id.* at 843-44.

House subscribed it.[295] On July 30, 1729, the Upper House read and engrossed the bill, assented to it, and ordered it subscribed, and sent it to the Lower House with Benjamin Tasker.[296] The Lower House received it.[297]

E. Georgia

The title and preamble to the Georgia Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien the problem. The Act was entitled "An Act to Prevent Fraudulent Deeds of Conveyances."[298] The preamble stated: "Whereas many inconveniencies may attend the want or neglect of recording in the public offices of this province all conveyances of lands, Negroes, and other chattels, or mortgages of the same . . . ."[299]

On January 18, 1755, the Lower House ordered that Clement Martin of Ebenezer, James Edward Powell of Savannah, and Noble Wimberly Jones, Esq., of Acton prepare and bring a bill to prevent fraudulent Conveyances.[300] On January 31, 1755, Clement Martin

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295. 36 MARYLAND ARCHIVES, *supra* note 127, at 346.

296. 36 *id.* at 348. Benjamin Tasker (-1767), born in England, came to America before 1718, was an in-law of Governor Thomas Bladen, served as a colonel of the provincial troops, as commissary general after Dulaney, and as president of the Council for a long period before his death. 9 J.T. WHITE & CO., *supra* note 273, at 188. One of his daughters married Daniel Dulaney, Jr. *Id.* His son became acting governor of Maryland in 1753. *Id.* Thomas Bladen was Provincial Governor from 1742 to 1747. RICHARD WALSH & WILLIAM LLOYD FOX, MARYLAND: A HISTORY 1632-1974 n.29 (1974).

297. 36 MARYLAND ARCHIVES, *supra* note 127, at 460.

298. PRINCE, *supra* note 102, at 108.

299. *Id.*

300. 13 Candler, *supra* note 105, at 41. Noble Wimberly Jones (1724-1805), a physician born near London, came to Georgia in 1733 with this physician father, practiced medicine in Savannah from 1748 to 1756, and served in Oglethorpe's Regiment as a member of the Lower House from 1754 to 1774, as speaker from 1768 to 1769 as a member of the Continental Congress from 1775 to 1776, and from 1781 to 1783, as a member of the Georgia Council of Safety, speaker of the Assembly in 1782, and president of the Georgia Constitutional Convention in 1795. A.N. MARQUIS CO., *supra* note 287, at 285; COLEMAN, *supra* note 190, at 93. James Edward Powell, wealthy landowner of Savannah, put down the attempted separate colony at Satilla River in 1758, led the second troop of Georgia Rangers in 1760 and the Ceded Lands Rangers in 1775, and as a Loyalist was banished by the State of Georgia, becoming lieutenant governor of the Bahamas in 1781 and governor in 1784, and died in Nassau. Robert S Davis, Jr., *Georgia Voyages: The Colonial Career of Captain William Thorson and the Two Brothers, in* 9 JOURNAL (B.I. Diamond ed., 2003), *at* http://www.hsgng.org/pages/gacolonialrangers.htm. Clement Martin emigrated from the West Indies to Georgia during the interregnum, was appointed a Councilor, and was suspended as a Councilor by

presented the bill and the Lower House read it the first time.[301] On February 4, 1755, the Lower House read the bill a second time.[302] On February 6, 1755, the Lower House read the third time, passed it, and ordered James Houstoun of Vernonburgh to carry it to the Upper House.[303] On that day, the Upper House received this bill from Joseph Ottolenghi of Savannah and James Houstoun and read the bill the first time.[304] On February 13, 1755, the Upper House made some amendments to the bill and read it a second time.[305] On February 17, 1755, the Upper House read the bill a third time, passed it, and sent it as amended for Lower House concurrence with James Habersham.[306] On February 18, 1755, the Lower House concurred.[307]

F. British West Florida

The title and preamble to the British West Florida Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien problem. The act was entitled "An act for preventing fraudulent mortgages and conveyances, for enabling feme coverts

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Gov. Reynolds in 1755. *Interregnum and Accession: Georgia in Transition, 1752-1757, at* http://etd.lsu.edu/docs/available/etd-1023102-173923/unrestricted/06chapter4.pdf. He received a Crown grant on Jekyll Island on April 5, 1768. Glynn County's Historic Markers, *at* http://www.rootsweb.com/~gaglynn/history/markers.htm.

301. 13 Candler, *supra* note 105, at 43.

302. *Id.* at 44.

303. *Id.* at 48.

James Houstoun (1705-1783), born in Houstoun, Scotland, came to America in 1736, settled on Ogeechee River and represented Little Ogeechee in the colonial legislature, was the younger brother of Sir Patrick Houstoun, father of the rebel Governor John Houstoun. *The Long County, Georgia Gen Web Site, at* http://currieart.com/longcounty/sitefiles/houston.htm.

304. 16 Candler, *supra* note 105, at 33. Jospeh Ottolenghi, an Italian, converted from Judaism to Anglicanism in England, came to Georgia in 1751 to oversee the silk industry and act as a catechist to the Negroes and was largely responsible for the passage of the Anglican Establishment Act in 1758. COLEMAN, *supra* note 190, at 230.

305. 16 Candler, *supra* note 105, at 39.

306. *Id.* at 43. James Habersham (1712-1775), born in Yorkshire, arrived in Savannah in 1738, established an orphanage, founded the colony's first mercantile firm in 1744, was the first to attract British shipping to the colony, promoted the silk culture in 1750, raised and exported the first cotton in the colony, served as Secretary of the Province and Councilor in 1754, President of the Upper House in 1767, and Governor of Georgia 1769-72, and vetoed the election of Noble W. Jones as speaker. 1 J.T. WHITE & CO., *supra* note 273, at 492.

307. 13 Candler, *supra* note 105, at 58.

to pass away their estates, and for making valid deeds of bargain."[308] The preamble stated:

> Whereas the registering of all deeds and conveyances of lands, tenements, Negroes, and other chattels will tend to the securing the titles of the proprietors and will prevent fraud being committed by evil-disposed and necessitous persons who may borrow money on security of their lands and Negroes before under mortgage to others without acquainting the lenders thereof, or otherwise for valuable considerations may sell and convey over their lands before disposed of, to the injury and loss of such second mortgagees and purchasers . . . .[309]

On March 2, 1770, William Godley introduced the bill in the Upper House, which was read the first time.[310] After the bill's second reading on March 8, 1770, the bill was committed to a committee of the whole house.[311] On March 10, 1770, after much discussion by the committee of the whole house, James Jones reported the committee had no amendments.[312] The bill was ordered to be engrossed.[313] On March 12, 1770, the engrossed bill was read the third time and passed.[314] The same day the Lower House read the bill for the first time.[315] After the bill's second reading on March 13, 1770, the bill was referred to a committee of the whole house.[316] After much discussion on March 13 and 15, 1770, David Waugh reported that the committee of the whole had made several amendments, extendi ng the bill to cover sales as well as mortgages and to cover slaves as well as goods, among other amendments.[317] On March 15, 1770, the Lower House agreed to

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308. ROBERT R. REA & MILO B. HOWARD, THE MINUTES, JOURNALS, AND ACTS OF THE GENERAL ASSEMBLY OF BRITISH WEST FLORIDA 377 (1979).

309. *Id.*

310. *Id.* at 210. William Godley received a land grant on July 28, 1772, along Thompson's Creek, now in Louisiana east of Baton Rouge. *1770-1773 British Land Grants, at* http://vidas.rootsweb.com/brgrants.html.

311. REA & HOWARD, *supra* note 308, at 210.

312. *Id.* James Jones received a land grant on May 14, 1772, along the Amite River, now in Louisiana east of Baton Rouge. *1770-1773 British Land Grants, at* http://vidas.rootsweb.com/brgrants.html.

313. REA & HOWARD, *supra* note 308, at 210.

314. *Id.* at 211.

315. *Id.* at 228.

316. *Id.*

317. *Id.* at 228-29. David Waugh signed a petition as an inhabitant of Pensacola on May 2, 1769. *Petition to British Authorities: May 2, 1769, at* http://vidas.rootsweb.com/bri1769pet.html. He received a land grant for 1850 acres on June 10, 1770. *British Land Grants: 1767-1771, at*

the amendments and on March 17, 1770 directed Waugh to report the bill's passage with the amendments to the Upper House.[318] Waugh and George Gauld carried the message to the Upper House on March 19, 1770.[319] The Upper House approved the amendments the same day.[320] On May 19, 1770, the lieutenant governor, Elias Durnford, gave his assent to the bill.[321]

G. New York

The title and preamble to the New York Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien problem. The act was entitled "An Act to prevent Frauds by Bills of Sale which shall be made and executed in the Counties therein mentioned."[322] The preamble stated:

> Whereas divers Frauds have been committed by Persons conveying their Goods Chattels and Effects by Bill of Sale by way of Mortgage or Collateral Security and afterwards selling the same to other Persons who were Ignorant of such former Sales whereby many Persons have been defrauded of very considerable Sums of money for the preventing whereof for the Future.. . .[323]

The Tories proposed the act. Samuel Gale, Tory of Orange County,[324] asked leave to bring the "Bill to prevent Frauds by Bills of Sale, which shall be made and executed in the Counties therein

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http://vidas.rootsweb.com/briland.html.

318. REA & HOWARD, *supra* note 308, at 229-30.

319. *Id.* at 212-13. George Gauld (c. 1732-1782), born in Scotland, served as the English naval surveyor for British West Florida from 1764 to 1781, member of the lower house from 1769 to 1771 where he sided with the "Scotch Party" and justice of the peace and judge of the quorum in 1777 and 1778, received land grants near Pensacola for 720 acres and Natchez for 2000 acres, was elected to the American Philosophical Society of Philadelphia in 1770, was exiled to New York in 1781, and died in London in 1782. JOHN D. WARE, GEORGE GAULD: SURVEYOR AND CARTOGRAPHER OF THE GULF COAST 13, 34, 115, 119, 129, 135, 163, 219 (1982).

320. REA & HOWARD, *supra* note 308, at 212-13.

321. *Id.* at 222, 242. Elias Durnford (1739-1794), an English military engineer, entered the Corp. of Engineers in 1759, served at the siege of Bellisle and Havana in Cuba, then as lieutenant governor of British West Florida, surrendering to Bernardo Galvez at Mobile in 1781, was the chief engineer at the siege of Martinique in 1794 and at the reduction of St. Lucia and Guadaloupe, and died in Tobago. *19th Century British Magazine "Notes and Queries," at* http://rootsweb.com/~bmuwgw/notesandqueries.htm.

322. 1775 N.Y. Laws 208.

323. 1775 N.Y. Laws 208.

324. *See* THOMAS JONES, HISTORY OF NEW YORK DURING THE REVOLUTIONARY WAR 37 (Edward Floyd De Lancey ed., 1879).

mentioned" on January 19, 1775, which he presented on January 19.[325] The Assembly read it a second time and committed it to a committee of the whole on February 28.[326] The Committee reported some amendments and the Assembly agreed and read the bill on March 8.[327] The Assembly read the bill the third time, passed it, and sent Assemblymen Gale and Simon Boerum to obtain the Council's concurrence on March 8, 1775.[328] They presented it to the Council on March 10.[329] The Council read it a second time on March 13. On March 16 the Council resolved into a committee of the whole with Councilman Axtell reporting it with no amendments.[330] The Council then read it a third time and passed it.[331] Councilman Henry White of the Council reported the Council's concurrence to the Assembly on March 17, 1775.[332]

H. Delaware

The title and preamble to the Delaware Anti-Chattel Mortgage Act also suggests that creditors desired to eliminate the secret lien problem. The Act was entitled "An Act to prevent frauds by clandestine bills of sale." [333] The preamble stated: "WHEREAS

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325. NEW YORK, JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW YORK 13, 15 (1775).

326. *Id.* at 56.

327. *Id.* at 72.

328. *Id.* at 74. Simon Boerum (1724-1775) of Brooklyn, a farmer, miller, and Clintonian, served as a Continental Congressman in 1775. A.N. MARQUIS CO., *supra* note 287, at 61.

329. NEW YORK COUNCIL, JOURNAL OF THE LEGISLATIVE COUNCIL OF THE COLONY OF NEW YORK (Weed, Parsons & Co. 1968) (1861). Samuel Gale (1748-1836), born in Hampshire, England, came to America in 1770 as assistant paymaster to the British forces in the Southern Provinces, resided in the Colony of New York, was imprisoned as a loyalist, removed to Quebec, Canada, was indemnified for his losses as a Loyalist, was Secretary to Governor Presscott of the Dominions of North America, and died in Farnham, Quebec. *Samual Gale, at* http://rootsweb.com/~qcmtl-w/GaleSamuel.html.

330. NEW YORK, *supra* note 325, at 1973-74. William Axtell (1720-1795), born in Jamaica and who resided many years in New York, served as a colonel of the provincial troops, and as a Tory lost a vast New York estate during the Revolution for which Parliament richly compensated him, and died in Chertsey, England. FRANCIS S. DRAKE, DICTIONARY OF AMERICAN BIOGRAPHY 45 (1872).

331. NEW YORK, *supra* note 325, at 1973-74.

332. *Id.* at 87. Henry White (1732-1786) of New York City, Tory merchant and consignee of the East India Company, later lost his property to confiscation and fled to London. A.N. MARQUIS CO., *supra* note 287, at 575.

333. 1 DELAWARE, *supra* note 134, at 218.

many frauds have been and daily are committed, by making clandestine bills of sale for goods and chattels within this government, to the prejudice of creditors, who by that means are defrauded of their just debts; For prevention whereof."[334]

On March 3, 1742/42, the House of Assembly of the Three Counties upon the Delaware read the "Bill to prevent Frauds committed by Clandestine Bills of Sale" for the first time, passed it with amendments, and ordered it for reading a second time.[335] On March 10, the House read the bill a second time with amendments and ordered a committee of Benjamin Swett from New Castle County, Joseph Dowding from Kent County, and Jacob Kollock of Sussex County to insert the House's amendments and lay the bill before the House.[336] On March 12, the House read the bill with the amendments inserted by the committee, passed it, and ordered it engrossed.[337] On March 13, the House instructed Jeremiah Woolaston of New Castle County, Joseph Dowding, and Jacob Kollock to wait with the Governor, acquaint him that the House had passed the bill, and lay it before him for concurrence.[338]

V. CONCLUSION

The chattel mortgage acts did not arise for the first time in the Anglo-American world in New England during the 1830s to accommodate the Industrial Revolution.[339] Instead, they arose nearly two hundred years earlier in the southern mainland English-American colony of Virginia in 1643. Other southern English-American colonies followed suit, namely South Carolina in 1698,

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334. *Id.*

335. MINUTES OF THE HOUSE OF ASSEMBLY OF THE THREE COUNTIES UPON DELAWARE AT SESSIONS HELD AT NEW CASTLE IN THE YEARS 1740-1742 82 (Henry C. Conrad ed., 1929) [hereinafter Conrad].

336. *Id.* at 94. Benjamin Swett (-1774) was the son of a Quaker tanner who emigrated from Massachusetts to New Castle County. Everett Stackpole, *Swett Genealogy, at* http://www.hannahdustin.com/Swett_genealogy5_25.htm. Joseph Dowding (1702-1748) emigrated from Boston, Massachusetts to Kent County. *The Pennocks of Primitive Hall, at* http://www.pennock.ws/surnames/fam/fam23271.html. Col. Jacob Kollock (1692-1772), descended from French Huguenots, served in the assembly for forty years as speaker of the House and as a delegate to the Continental Congress of 1765. *Jacob Kollock, at* http://www.kollockfamilyinamerica.homestead.com/coloneljacob.html.

337. Conrad, *supra* note 335, at 98.

338. *Id.* Jeremiah Wollaston was a prominent Quaker landholder in New Castle County. WILLIAM DAVIS, HISTORY OF BUCKS COUNTY, PENNSYLVANIA 166 (1905), *excerpts available at* www.rootsweb.com/~pabucks/silascatkinson.html.

339. *See supra* note 11 and accompanying text.

North Carolina in 1715, Maryland in 1729, Georgia in 1755, and British West Florida in 1770, either for the same reasons,[340] or to attract British investment money in competition with colonies that already had a chattel mortgage act.[341]

Nor did legislature pass these colonial chattel mortgage acts to legalize an otherwise fraudulent transaction. Reported cases in the southern states indicate that the common law upheld the nonpossessory secured transaction prior to the passage of the respective chattel mortgage act.[342] So the function of the earliest chattel mortgage acts in the Anglo-American world was not to legalize the transaction, but to declare it void if not registered,[343] or provide a priority rule favoring the registered transaction.[344]

The Northeastern States' Industrial Revolution had nothing to do with spawning these chattel mortgage acts. A different wealth-creating economy existed in the southern American English colonies in the seventeenth century, namely plantation agriculture. Planters seeking riches through expansion were willing to grant nonpossessory security interest in their plantations, its labor contracts, and its agricultural products to obtain borrowings.[345] And wealthy neighbors were willing to lend moneys on that basis.[346]

The statutes' legislative history trumpets the secret lien problem as spawning their passage.[347] The nonpossessory secured transaction, unregistered and secret, under the common law interfered with other transactions, primarily the judgment lien on the debtor's property and sales of the debtor's property.[348] Under

340. *See supra* notes 13-136 and accompanying text.

341. *See supra* note 151 and accompanying text.

342. *See, e.g.,* Clayborn v. Hill, 1 Va. (1 Wash.) 177, 183 (1793) (existing at common law before 1748 chattel mortgage act, which merely directs manner of notoriety); Gassaway v. Dorsey, 4 H. & McH. 405 (Md. 1799) (stating that prior to 1729 chattel mortgage act no deed for personal property need be filed); Hambleton's v. Hayward, 4 H. & J. 443 (Md. 1819) (noting that 1729 chattel mortgage act intended that speedy information should be given to every person of personal property when transferor retains possession); Hudson v. Warner, 2 H. & G. 415 (Md. 1828) (stating that the object of 1729 chattel mortgage act to suppress secret sales by recording so no one injured by secret and unknown conveyances); *see also* Hardaway v. Semmes, 24 Ga. 305 (1858) (noting that nothing in common law required or encouraged mortgagees to record).

343. *See supra* note 30 and accompanying text.

344. *See supra* note 84 and accompanying text.

345. *See supra* notes 210-216 and accompanying text.

346. *See supra* notes 219-220 and accompanying text.

347. *See supra* notes 265-337 and accompanying text.

348. *See supra* note 241 and accompanying test.

the derivation principle as a sale, the nonpossessory secured transaction taken on the eve of insolvency as a preference[349] would defeat a subsequent judgment lien levied on the debtor's property.[350] The chattel mortgage act registration would alert the sheriff and the judgment lienor to the judgment lien's wasted effort at levy.

349. *See supra* notes 219, 220, 223, 227 and accompanying text.

350. *See* Flint, *Secured*, *supra* note 95, at 381-87; Flint, *Northern*, *supra* note 95, at 26-46. *See also* 77 MARYLAND ARCHIVES, *supra* note 127, at 557-81 (stating that in 1728 judgment lienor failed in attack against nonpossessory secured transaction as a fraudulent conveyance).